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Oct 25
VERMONT SUPREME COURT
24

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

BY
WHEELOCK G. VEAZEY.

U N
5 0 3
V E T

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Rec June 7, 1866

JUDGES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

Adams, Fullam v. 391
Adams, Morgan v. 233
Aiken v. Bridgman, ... 249
Ashley, Buck v. 475
Austin v. Bailey et al., . . . 219

Bailey et al., Austin v. . . . 219
Barber, Squires & Sherry v. . . . 558
Barnes, Hydeville Co. v. . . . 588
Barney, Galpin v. 627
Barre, Whitcomb v. 148
Barron, State v. 57
Beard v. Murphy, ... 99
Beckwith, Evans v. 285
Beebe, Sumner, Adm'r, v. . . 562
Bemis, Morrill v. 155
Benson v. Hitchcock, Adm'r, . 567
Bible Society et al, Putnam et al. v. 271
Bishop et al., Prouty v. . . . 634
Black, Stow v. 25
Blodgett, Lemington v. . . . 210
Blodgett, Lemington v. . . . 215
Bonett v. Stowell, ... 258
Booth et al., Frary et al. v. . . 78
Boyd, Briggs v. 534
Boynton, Weeks v. 297
Brainerd v. Casey et al., . . . 479
Brainerd et al., Carpenter v. . . 145
Bridgman, Adm'r, Holmes v. . . 28
Bridgman, Aiken v. 249
Briggs v. Boyd,. 534

Brown et al. v. Haven, . . . 439
Buck v. Ashley, ... 475
Buck v. Gilson et al. . . . 653
Buck, State v. 657
Buswell, Cobb v. 337

Canal Co. v. Rockingham, . . 622
Carlton, McCrillis v. 139
Carpenter v. Brainerd et al., . 145
Carpenter v. Estate of Snell, . 255
Carpenter v. McClure, . . . 127
Carr et al., State v. 191
Casey et al., Brainerd v. . . . 479
Celley v. Gray, ... 136
Chandler v. Dyer, ... 345
Chase et al. & Trs., McGregor v. 225
Chase, Ovitt v. 196
Chase, Person, Adm'r, v. . . 647
Clark, Adm'r, v. Crosby, . . 188
Clark, State v. 471
Clough v. Patrick, ... 421
Cobb v. Buswell, ... 337
Conn. & Pass. R. R. R. Co., Wakefield v. 330
Cook et al., Ex'rs, Richardson, Adm'r, v. 599
Cook's Estate, Orcutt v. . . 515
Cooper et al. Wing, Ex'r, v. . 169
Corlis et al. v. Putnam, . . 119
Corlis, Smalley v. 486
Crosby, Clark, Adm'r, v. . . 188

Danby Bank v. State Treasurer, 541
Danforth et al. v. Walker, 239
Davis, Adm'r, v. Marshall, 69
Dexter, Johnson, Adm'r, v. 641
Dodds, Russell v. 497
Dougherty, Smith v. 530
Dow v. Worthen, 108
Dubois et al., Hubbard, Adm'r, v. 94
Dummerston v. Newfane, 9
Dyer, Chandler v. 345
Dyer v. Graves, 369

Evans v. Beckwith, 285

Fairchild v. Lampson & Tr. 407
Farrar v. Rollins, 295
Farr v. Ladd et al. 156
Fire District, Hunneman et al. v. 40
Frary et al. v. Booth et al. 78
Fullam v. Adams, 391
Fullam v. Ives, 659
Fuller v. Jewett & Tr. 473

Galpin v. Barney, 627
Garfield et al., Perrin v. 304
Gilson et al., Buck v. 653
Graves, Dyer v. 369
Graves v. Severens, 651
Gray, Celley v. 136

Hall, Haynes v. 20
Hartland, Sherburne v. 528
Haven, Brown et al. v. 439
Haynes v. Hall, 20
Henry et al., Huntley v. 165
Henry et al. v. Jackson et al., 431
Henry v. Huntley, 316
Hickok, Therasson v. 454
Hill, Adm'r, v. New Haven, 501
Hitchcock, Adm'r, Benson v. 567
Hitt v. Slocum, 524
Holmes v. Bridgman, Adm'r, 28
Houston, Wells v. 245
Hubbard, Adm'r, v. Dubois et al., 94
Hubbard, Viall v. 114
Hulett, Adm'r, v. Hulett, 581
Hulett, Hulett, Adm'r, v. 581
Humphrey, Newell, Adm'r, v. 265
Hunneman et al. v. Fire District, 40
Huntley v. Henry et al., 165
Huntley, Henry v. 316
Hutchins et al. v. Moody, 313
Hydeville Co. v. Barnes, 588

Ives, Fullam v. 659

Jackson et al., Henry et al. v. 431
Jackson v. Kirby, 448
Jamaica, May v. 23
Jewett & Tr., Fuller v. 473
Johnson, Adm'r, v. Dexter, 641

Keyes v. Rines, Tr. & Cl., 260
Kimball's Adm'r, Sargent's Adm'r v. 320
Kirby, Jackson v. 448
Kirk & Trs., Stevens v. 204

Ladd et al., Farr v. 156
Lamphire, Town v. 52
Lampson & Tr., Fairchild v. 407
Lemington v. Blodgett, 210
Lemington v. Blodgett, 215
Little v. Sleeper, 105
Livingston, Miller v. 467

Magoon, State v. 122
Marshall, Davis, Adm'r, v. 69
May v. Jamaica, 23
McClure, Carpenter v. 127
McCrillis v. Carlton, 139
McDaniels, Park v. 594
McGregor v. Chase et al. & Trs., 225
McKee, Wright v. 161
Meech v. Estate of Meech, 414
Meech's Estate, Meech v. 414
Miller v. Livingston, 467
Mining Co., Waite v. 608
Montgomery v. Vinton, 514
Moody, Hutchins et al. v. 313
Morgan v. Adams, 233
Morrill v. Bemis, 155
Mullen v. Sherman, 493
Murphy, Beard v. 99

New Haven, Hill, Adm'r, v. 501
N. E. Protective Union, Tenney et al. v. 64
Newell, Adm'r, v. Humphrey, 265
Newfane, Dummerston v. 9
Norton v. School District, 521

Orcutt v. Estate of Cook, 51
Ovitt v. Chase, 196

Page, Woods v. 252
Park v. McDaniels, 594
Patrick, Clough v. 421
Perkins, Sheldon v. 550
Perrin v. Garfield et al., 304
Perry et al., Whittaker v. 631
Person, Adm'r, v. Chase, 647
Porter v. Wheeler, 281
Powers, Worden v. 619
Prichard et al., Strickland et al. v. 324
Prouty v. Bishop et al., 634
Putnam, Corliss et al. v. 119
Putnam et al. v. Bible Society et al., 271

Rice, Taggart v. 47
Richardson, Adm'r, v. Cook et al., Ex'rs, 599
Richardson v. Squires, 640
Rines, Tr. & Cl., Keyes v. 260
Rockingham, Canal Co. v. 622
Rollins, Farrar v. 295
Russell v. Dodds, 497

Sargent et al., Stockwell, Prosecutor, v. 16
Sargent's Adm'r v. Kimball's Adm'r, 320
School District, Norton v. 521
Severens, Graves v. 651
Seward, Adm'r, Thrall & Smith v. 573
Sharon v. Strafford, 74
Sheldon v. Perkins, 550
Sheldon v. Sheldon & Tr. 152
Sheldon & Tr., Sheldon v. 152
Sherburne v. Hartland, 528

Sherman, Mullen v. . . 493
Sleeper, Little v. . . 105
Sleeper, State v. . . . 122
Slocum, Hitt v. . . 524
Smalley v. Corliss, . . 486
Smith v. Dougherty, . . 530
Snell's Estate, Carpenter v. . 255
Squires, Richardson v. . . 640
Squires & Sherry v. Barber, . 558
Stanton v. Estate of Stanton, 411
Stanton's Estate, Stanton v. . 411
State v. Barron, ... 57
State v. Buck, ... 657
State v. Carr et al., . . . 191
State v. Clark, ... 471
State v. Magoon, ... 122
State v. Sleeper, ... 122
State Treasurer, Danby Bank v. 541
Stevens v. Kirk & Trs., . 204
Stockwell, Prosecutor, v. Sargent et al., ... 16
Stow v. Black, ... 25
Stowell, Bonett v. . . 258
Strafford, Sharon v. . . 74
Strickland et al. v. Prichard et al. 324
Sumner, Adm'r, v. Beebe, . 562

Taggart v. Rice, ... 47
Tenney et al. v. N. E. Protective Union, ... 64
Therasson v. Hickok, . . 454
Thrall & Smith v. Seward, Adm'r, 573
Town v. Lamphire, . . 52

Viall v. Hubbard, . . 114
Vinton, Montgomery v. . . 514

Waite v. Mining Co., . . 608
Wakefield v. Conn. & Pass. R. R. R. Co., ... 330
Walker, Danforth et al. v. . 289
Walker v. Wilmarth, . . 289
Warner v. Warner's Estate, . 356
Warner's Estate, Warner v. . 356
Weeks v. Boynton, . . 297
Wells et al. v. Estate of Wells, 483
Wells' Estate, Wells et al. v. . 483
Wells v. Houston, . . 245
Wheeler, Porter v. . . . 281
Whitcomb v. Barre, . . 148
Whittaker v. Perry et al., . 631
Wilder, Williams v. . . 613
Willard et al., Wood et al. v. . 377
Williams v. Wilder, . . 613
Wilmarth, Walker v. . . 289
Wing, Ex'r, v. Cooper et al., . 169
Wood et al. v. Willard et al., . 377
Woods v. Page, . . 252
Worden v. Powers, . . 619
Worthen, Dow v. . . . 108
Wright v. McKee, . . 161

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF WINDHAM,

AT THE

FEBRUARY TERM, 1864.

[CONTINUED FROM VOL. 36, page 744.]

PRESENT:

HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

TOWN OF DUMMERSTON *v.* TOWN OF NEWFANE.*

Dower. Removal of Paupers. Husband and Wife.

Under the statute of this State the widow's right of dower becomes a present vested estate on the decease of the husband, which does not depend on the contingency of the dower being assigned or set out.

The decision in the case of *Londonderry* v. *Acton*, 3 Vt. 122, where it is held that one is not liable to be removed as a pauper while owning and occupying a freehold estate, approved.

Where a wife has a freehold estate in dower, though not assigned, in a piece of land which adjoins the farm upon which she lives with her present husband, and has so lived since their marriage, and which has been occupied and improved by them together in connection with the said farm, and has contributed towards her support, it is *held*, that she is so far in the actual possession and occupancy of said land as to be irremovable from it as a pauper; and while she and her husband continue to live together he cannot be separated or removed from her under an order of removal.

* This case was argued at the February Term, 1862, and re-argued at the February Term, 1863, and the opinion was delivered at the present Term.

Dummerston *v.* Newfane.

APPEAL from an order of removal of H. N. Aldrich and family from Dummerston to Newfane. It was alleged in the order that said Aldrich was likely to become chargeable to Dummerston as a pauper. All that appeared in a statement of facts agreed upon by the parties in respect to said allegation was that the grand-mother and father of said Henry N. and some others of his blood relations, had been insane; and the said Henry N. was insane at the time of said order of removal, and had shortly before been a patient at the Vermont Asylum, but is now, and has been for some months, sane. The other facts agreed to are set forth in the opinion.

At the September Term, 1861, BARRETT, J., presiding, the court rendered judgment for the defendant,—to which the plaintiff excepted.

A. Keyes, for the plaintiff.

I. It is admitted by the case that the legal settlement of Aldrich at the time of the making of the order, was in Newfane. The wife, taking the settlement of her husband, was also settled in Newfane. The facts furnish "a present fair probability that he would soon become a charge upon the town." *Londonderry* v. *Acton*, 3 Vt. 122.

II. But the defendant town contends that Aldrich was at the time the owner of a freehold estate, from which he could not be removed; and stands upon the case of *Londonderry* v. *Acton*.

(*a.*) The decision in that case was not well considered, and ought to be revised; or at least ought not to be extended.

That decision was based upon MAGNA CHARTA and the English decision *construing* that charter. By that charter, as construed, no freeholder can be disseized of his freehold, except for crime, and then by verdict of jury, in due course of law. The English courts considered an order of removal from the homestead, to be a disseizin,—a conclusion founded more upon the peculiar state of the times, than upon any legal principle.

(*b.*) By our constitution and laws, every pauper likely to become chargeable is liable to be removed, and freeholders are not excepted, and our laws must prevail when they clash with foreign laws. When we made our constitution we engrafted into the declaration of rights, a part of the 29th chapter of Magna Charta, but carefully left out the words "*Nullus liber Homo disseisiatur de libero tenemento*," &c.

Dec. Rights, 24. By using a part and omitting a part, the part omitted is excluded.

III. It would seem, from the reading of the Charta, that the pauper must be seized of such a freehold, that the order of removal will operate a disseizin thereof. To remove him from his dwelling house would be ejecting him from his freehold and a disseizin under the Charter. But removing a pauper from one parish to another works no diseizin of his out lands, on which he does not reside, for it is no eviction therefrom. Hence the pauper must *reside on his frank tenement* in order to be irremovable therefrom. We think the decisions in England establish this doctrine. *Stanlock* v. *Bampton*, 19 Vin. 371; *Granby* v. *Musley*, 3 Burns, 414; *Ashbrittle* v. *Wiley*, 19 Vin. 372; *Burclear* v. *Woodbury*, 19 Vin. 373; *Aythrop Rooding* v. *White Rooding*, 3 Burns 424; *Leeds* v. *Blackfordby*, 3 Burns 425; *Rex* v. *Martly*, Smith R. 345; *Sandwich* v. *Heber*, Burr. Set. Cas. 7; *Rex* v. *Dunchurch*, do. 553; *Harrows* v. *Edgworth*, 19 Vin. 371.

The same doctrine is held by the decisions in this State. *Londonderry* v. *Acton*, 3 Vt. 122; *Middletown* v. *Pawlet*, 4 Vt. 202; *Brookfield* v. *Hartland*, 6 Vt. 401; *Walden* v. *Cabot*, 25 Vt. 522.

The cases of settlement have no application to the present case, for here the settlement in Newfane is admitted.

IV. The paupers were not seized of a freehold in the town of Dummerston. For the dower of Mrs. Aldrich has not been assigned. 1 Cruise Dig. 159; *Windham* v. *Portland*, 4 Mass. 384.

By Magna Charta she might remain on her deceased husband's estate during quarantine of forty days; so by statute of Mass. So by our statute, during settlement of the estate, or one year, the time allowed to settle the estate. But the privilege of residence gives no estate to the widow. It is merely a provision to save the widow and children from want.

Her right of dower is a mere chose in action and does not become an estate until dower assigned.

V. The widow before dower assigned has no estate to communicate to her second husband to enable him to gain a settlement or become irremovable. *Rex* v. *Painswick*, Burr. Set. Cas. 783 and Mansfield's note; *Rex* v. *Northweald Basset*, 2 B. & C. 724; *Rex* v. *North Curry*, Doug. 770 n.; 2 Bott. 477; *Rex* v. *Canford Magna*, 2 Har,

Dig. 5343; *Rex* v. *Axbridge*, 2 Har. Dig. 5348; *Rex* v. *Okeford Fitzpaine*, do. do.; *Rex* v. *Barnard Castle*, 2 Ad. & E. 108; *Windham* v. *Portland*, 4 Mass. 384.

C. K. Field, for the defendant.

KELLOGG, J. This was an appeal from an order of removal requiring Henry N. Aldrich, as a person likely to become chargeable to the town of Dummerston, to remove with his family and effects from that town to the town of Newfane. It is conceded that his legal settlement at the time of the making of the order of removal was in the town of Newfane, but it is claimed on the part of that town that his wife was irremovable from the town of Dummerston by reason of being in the actual possession and enjoyment of a freehold estate therein of which she was seized in her own right, when this order of removal was made, and that, consequently, her *status* of irremovability was communicated to her husband. It is settled in this State, by repeated decisions, that an order of removal can never be allowed to have the effect to separate the husband from the wife so long as they cohabit together in the family relation, and that an order which would require the removal of either from the other, and thereby break up the family relation between them, should be treated as void. *Hartland* v. *Pomfret*, 11 Vt. 440; *Northfield* v. *Roxbury*, 15 Vt. 622; *Rupert* v. *Winhall*, 29 Vt. 245; *Hartland* v. *Windsor*, 29 Vt. 354. The law recognizes no coercive separation of either from the other except for crime. If, therefore, the wife was, at the time of making this order of removal, irremovable from the town of Dummerston, it follows by a logical necessity that the husband was also then irremovable from that town,—it being agreed that they were then cohabiting together in the relation of husband and wife. This brings us to the consideration of the question whether she was seized and possessed of such an interest in the thirty acres of land of which her former husband, Charles Goss, died seized, as would render her irremovable at the time when this order was made.

It appears that Goss, at the time of his decease, left no other real estate except this piece of thirty acres, and that this piece was situated in Dummerston contiguous to and adjoining the farm which, after the marriage of his widow with Aldrich, was occupied by Aldrich up to the time of the making of this order of removal, and

that, during all that time, the thirty acres was used, occupied, and improved by Aldrich and his wife, although they did not actually reside upon it. As the widow of Goss, she was, *prima facie*, entitled to dower in his estate;—at least, in the absence of evidence tending to show the fact, there can be no presumption that she was barred from claiming dower. This right of dower is a right to the use during her natural life of one-third of the real estate of which her husband died seized in his own right; and by statute provisions, she is allowed, after the decease of her husband, to continue to occupy his real estate with his children and family until her dower shall be set out. Comp. Stat., p. 362, § 1,—p. 363, § 11. Gen. Stat., p. 411, § 1,—p. 413, § 10. In *Rex* v. *Inhabitants of Northweald Bassett*, 2 B. & C., 724,—9 E. C. L. 232, S. C.,—it is held that a widow, before assignment of dower, has not such an interest in the land of which she is dowable as to be irremovable from the parish in which the land lies. This is upon the common law theory that dower, until it is assigned, is a mere right of action, and not a right in possession. But we are agreed in the opinion that, under the statute of this state, the widow's right of dower becomes a present vested estate on the decease of the husband, which does not depend on the contingency of the dower being assigned or set out. Although her estate is a life estate, her right to the use of one-third of the real estate of which the husband died seized is as perfect, in every sense, as the right of the heir to the remainder. This rule of construction in respect to the widow's right of dower under the statute of this State has been adopted in repeated decisions made in this court. *Grant* v. *Parham*, 15 Vt. 649; *Gorham* v. *Daniels*, 23 Vt. 600.

In the case of *Londonderry* v. *Acton*, 8 Vt. 122, it was held that no person could be removed, or be the subject of removal, as a pauper from a freehold estate while owning and occupying it. In *Brookfield* v. *Hartland*, 6 Vt. 401, it was held that a tenant in dower could not be removed as a pauper from lands which she occupies as a tenant in dower; and in *Walden* v. *Cabot*, 25 Vt. 522, a person in actual possession of a *trust* estate, and living on it with his family, was held not to be subject to removal as a pauper,—the rule being the same whether the estate is a *legal* or an *equitable* freehold. These cases show that it has been recognized in this court as a settled rule that

a pauper cannot be removed from his freehold estate, and the rule makes a case excepted out of the statute. In cases affecting the liability of towns for the support of paupers, the maxim *stare decisis* is especially applicable. It is claimed by the appellee's counsel that the decision in the case of *Londonderry* v. *Acton*, was not well considered, and ought to be revised, inasmuch as it was based on English decisions giving a construction to the declaration in *Magna Charta* that no man shall be disseized of his freehold except for crime, and then only by a verdict of a jury in due course of law,—a declaration which, as is claimed, was never incorporated into our constitution or statute law. We think that the rule forbidding the removal of a person as a pauper from his freehold estate is a rule of humanity and policy. It is a tribute of respect to the feelings with which a person regards that which is his own,—to the attachment which is cherished for the associations of home and family,—and to the influences which connect the memories of better and more prosperous days with local scenes. It is a rule resting upon the best feelings of our nature for its foundation, and we think that the provisions in *Magna Charta*, which has been referred to, was intended not so much to confer a new privilege as to recognize one already existing. Mr. Justice FOSTER, in the case of *Rex* v. *Aythrop Rooding*, Burr. Sett. Cas. 412, suggested that this privilege of irremovability arose under the provisions of *Magna Charta*, but his language in that case distinctly implies that those provisions made no change in the common law as it existed previous to the time of *Magna Charta*. He says: "The husband himself would not have been removable from his own if he had gone to *Aythrop Rooding*. His right is under *Magna Charta*. 'None shall be disseized of his freehold,' &c. This woman was not become chargeable to *Aythrop Rooding*. If she had become actually chargeable to that parish, I think that by common law they must have maintained her. This is the common law so far back as from the time of *The Mirror*." In that case, the wife was held to be irremovable from the *copyhold* (not *freehold*) tenement of her husband on which she was residing at *Aythrop Rooding*, although he was legally settled at *White Rooding*, and the language of Justice FOSTER attributes the *status* of irremovability to the rules of the common law quite as distinctly as it does to the provisions

Magna Charta. If the rule existed as early as the time of *The Mirror*, it is of much greater antiquity than *Magna Charta*. Bradshaw, "the King's attorney," in *Reniger* v. *Fogassa*, 1 Plowd. 8, refers to *The Mirror* as a book "which was made before the conquest," and its great antiquity is spoken of by Lord Coke in the Prefaces to 9 Co. and 10 Co. Marvin's Legal Bibl. 396. We think that the common law, independently of any provision in *Magna Charta*, was hostile to the coercive removal of a person from his property except for crime; and that it was well said by Justice DENISON, in this case of *Rex* v. *Aythrop Rooding*, that "it is not agreeable to the liberty of mankind that a person should be removed from his own estate."

The wife of Aldrich was seized of a vested freehold interest or estate in dower in the thirty acres of which her former husband died seized, and had a right to occupy that land until her dower was set out. Was she in such actual occupancy or possession of it as would prevent her from being removed from it if she had been a *feme sole*? The dwelling house in which she and Aldrich resided after their marriage was situated on the farm occupied by him, and this farm was situated adjoining to the thirty acres; but, from the time of her marriage to Aldrich up to the time of the making of this order of removal, the thirty acre piece was occupied and improved by him and her in connection with the farm on which they resided. It was contributory towards her support, and she and her husband received the profits from it, and they were as much in the actual corporal possession of it as if it had formed a part of the farm on which their dwelling house was situated. She was practically domiciled on the thirty acres, and the use and improvement of that land was hers as completely as it would have been if her dwelling had been upon it. We therefore regard her as having been so far in the actual possession and occupancy of the land in which she had this vested freehold estate in dower that she was irremovable from it; and while she and her husband continued to live together, he could not be separated or removed from her under an order of removal.

The burden is on the town supporting an order of removal to show that the pauper was likely to become chargeable. The character or extent of the insanity of Aldrich does not distinctly appear in the agreed statement of facts. Whether he was in poverty and in need of

relief, or was a man of wealth, or whether his insanity rendered him incapable of labor, cannot be determined upon any fact contained in this statement; and we think that it does nor distinctly or sufficiently appear that he was likely to become chargeable as a pauper. But we have felt that it was due to the great ability and research with which the argument in this case has been illustrated, that our decision should not stand upon any narrow ground; and, without reference to this point, we are satisfied that at the time of the making of this order of removal, the wife of Aldrich was irremovable from her freehold estate in dower in Dummerston, although her dower had not been assigned or set out, and that, as she and her husband were living together, her *status* of irremovability protected him from a coercive removal under the order in this case.

Judgment of the county court for the defendant affirmed.

Probate Court, BENJAMIN F. STOCKWELL *Prosecutor*, *v.* BRADFORD C. SARGENT AND LUTHER SARGENT.

Dower. Ejectment. Rents and Profits. Administrator. Appeal. Partition. Bond.

The lease of a widow's dower by her guardian becomes inoperative by her decease. If an heir in possession under such lease, refuse on demand to let the other heirs into joint occupancy, they may maintain ejectment and recover to the extent of their right including rents and profits.

If her administrator should receive and hold the rent the heirs might collect it of him.

These rights and remedies of the heirs not in possession are not lost or suspended by an appeal from an order appointing commissioners to make partition of the premises in which the widow had her estate in dower, therefore where the appeal is not prosecuted the heirs cannot recover for the rents and profits pending the appeal, as intervening damages, on a bond given by the lessee in possession to prosecute the appeal and to pay intervening damages.

ACTION on a bond given by the defendants to the probate court on one of the defendants taking an appeal from an order of the probate court appointing commissioners to make partition of certain real estate. The bond was given for the prosecution of the appeal and to

pay intervening damages. The case was referred, and the facts found by the referee are set forth in the opinion.

The county court at the September Term, 1863, BARRETT, J., presiding, rendered judgment, *pro forma*, on the referee's report, for the plaintiff to recover nominal damages. Exceptions by the plaintiff.

George Howe, for the prosecutor, insisted that the commissioners could lawfully proceed, on the 3d of May, 1859, to make partition of the lands in question. *Fletcher et al.* v. *Fletcher*, 29 Vt. 98; *Curtis* v. *Beardsly*, 15 Conn. 522. This action is properly brought in the name of Benjamin F. Stockwell, the husband of Sallie Stockwell. 1 Chitty on Pleadings 19, and cases there cited; 1 Bright's Husband and Wife 64, and cases there cited; *Holton* v. *Whitney*, 28 Vt. 448. The damages proved are *intervening damages* within the meaning of the bond, and as such are recoverable in this suit. *Sargeant et al* v.. *Sargeant et al.*, 20 Vt. 297. The plaintiff's mode of proceeding is the one especially provided by statute, is the only remedy known to the law, and a fair construction of the statute provision entitles the plaintiff to recover. G. S. pp. 426–7, and 360, § 27.

———, for the defendants.

PECK, J. This case comes here upon exceptions to the decision of the county court, upon special report of a referee. The action is upon a bond given by the defendants to the probate court, on the defendant, Bradford C. Sargent, taking an appeal from an order of the probate court appointing commissioners to make partition of certain real estate among the heirs of Luther Sargent senior, of whom the plaintiff's wife is one. Luther Sargent senior died many years ago, the precise time does not appear, but from the report it must be taken to have been quite a number of years previous to the proceedings and transactions in question in this case. At his death he left considerable estate, and left surviving several heirs, and his widow Elizabeth Sargent. The widow had had dower assigned her in the real estate of the deceased which she had the benefit and enjoyment of till her death on or about the 25th of April, 1859. For several years next previous to and at her death she was under the guardianship of Joseph Goodhue, appointed by the probate court. About the first of April, 1859, her guardian leased the widow's dower for one year, a portion of it to Bradford C. Sargent and a portion of it to Luther Sargent the other

defendant. On the 3d day of May, 1859, John L. Sargent, one of the heirs of Luther Sargent senior, applied to the probate court for partition of the premises in which the widow had had her estate in dower, and that court appointed commissioners for that purpose. From that order the defendant Bradford C. Sargent appealed and gave the bond in question. That appeal was never entered in the county court by either party, and the commissioners without any new appointment, in March, 1860, made partition of the estate, and on the 26th of March, 1860, their report was filed in the probate court and accepted and confirmed. In that partition 33 acres of the land so leased to Bradford C. Sargent was set to this plaintiff's wife.

The referee reports that the plaintiff claimed to recover the rents and profits of the said 33 acres of land for the season of 1859. The referee finds that if such use or rents and profits properly constitute a ground of recovery in this action, the plaintiff should recover forty dollars, otherwise he assesses the damages at one dollar, a mere nominal sum. The county court rendered judgment for the plaintiff for one dollar damages, to which the plaintiff excepts.

The plaintiff claims he is entitled to recover the $40. for the use of the 33 acres of land during the time the partition was delayed by the appeal, under the provision in the bond for the payment of intervening damages. The solution of this question depends on what the rights and remedies of the heirs of Luther Sargent senior were on the death of Elizabeth Sargent in respect to the lands in which she had had dower, and how far those rights and remedies have been lost or impaired by the appeal. On the death of the widow, in April, 1859, the plaintiff's wife and other heirs of Luther Sargent senior became the absolute owners of the estate. Their title did not depend on any future proceedings of the probate court; they took their title by descent at the death of Luther Sargent senior and held it subject to the widow's estate in dower during her life. On her death the premises were by that event disencumbered of the estate in dower, and their right to possession was immediate. They did not derive their title from her, but solely from Luther Sargent senior. No proceedings in the estate of Elizabeth Sargent were necessary to perfect their right to immediate possession, nor had her administrator any control over the premises. The leases which her guardian made to

defendants a few days before her death, by her decease became inoperative. The heirs had a right to demand possession of any one in under her guardian, and if not surrendered, to recover the possession with rents and profits by action of ejectment. This right was a common right in all the heirs as tenants in common. If any of the heirs were in possession, claiming under a lease from the guardian of the widow, and refused on demand to let the plaintiff's wife and the other heirs into joint occupancy with them, those out of possession might have treated it as an ouster and sustained ejectment and recovered to the extent of their right, including rents and profits. The plaintiff's wife and other heirs out of possession had another remedy. It appears that the lessees under the lease from the guardian of the widow continued to occupy after her decease, and paid the rent to her administrator. Her administrator had no right to receive or hold that rent, and the heirs might have treated that as their money, and in some form collected it of him. The appeal did not interfere with these rights or remedies of the heirs in the least. Either of these remedies might have been pursued, even pending the appeal. It is claimed by the plaintiff's counsel that the heirs could bring no suit until the estate was settled, or the administrator had abandoned or passed the premises over to the heirs. But from the lapse of time after the death of Luther Sargent senior, and other facts appearing in the report, it must be presumed that his estate had been settled, and the estate abandoned by his administrator to the heirs. Indeed, if this were not so the proceeding for partition could not have been entertained by the probate court. We have already seen that the premises constituted no part of the estate of Elizabeth Sargent; her right terminated at her decease; therefore her administrator could not stand in the way of any remedy the heirs might have chosen to adopt. We cannot see how the plaintiff has lost the rents and profits of the premises by the pendency of the appeal, as the remedy to recover the possession and use of the land was thereby neither impaired nor suspended. Nor would a suspension of such remedy entitle the plaintiff to recover in this action for such use of the premises, unless the delay caused an ultimate loss, or produced some special damage beyond the mere inconvenience of delay which is necessarily attendant on every appeal. It is claimed that but for

the appeal the partition would have been sooner perfected, and thus the plaintiff sooner let into possession of the portion ultimately assigned to him in severalty. But the right of joint occupancy, and the right to his equal share of the use or rents and profits of the premises during that delay, is an equivalent for that. It is a delay of the partition without any special pecuniary loss. In legal contemplation there can be no difference in value between the plaintiff's *portion* of the use of the *entire* premises, and the *entire* use of the plaintiff's *portion* of the land after it is severed by partition. In such case mere delay is not such special damage as comes within the term intervening damages; much less can it be said that such delay gives the plaintiff the right to recover the value of the rents and profits during that time. To allow such recovery would be to allow the plaintiff to recover what he has not lost. Besides, it is by no means certain that the plaintiff would have obtained possession of the portion assigned to him sooner than he did, had no appeal been taken. The probate court had no power under such partition to enforce his decree against an adverse claimant, by putting the plaintiff in possession. It is obvious in this view of the case that it can not be said that the plaintiff lost his portion of the rents and profits pending the appeal, and therefore such rents and profits cannot be recovered in this action on the bond as intervening damages.

This renders it unnecessary to notice the other questions discussed, because if we should decide them all in favor of the plaintiff, still the result would be that there is no error in the decision of the county court of which the plaintiff can complain, and the defendant took no exception.

Judgment affirmed.

FRANKLIN P. HAYNES *v.* NEWELL B. HALL.

Sheriff. Fees.

If a sheriff serving process charge and receive fees for services not enumerated in the statute, in good faith and with no intent to violate the law, he is not liable to the penalty imposed by statute, § 17, ch. 125, G. S., for taking illegal fees.

Haynes *v.* Hall.

This was an action upon § 17, ch. 125, G. S. Plea, the general issue.

The case was submitted to the court upon a statement of facts agreed to by the parties, substantially as follows:

The defendant as deputy sheriff of the county of Windham, on or about the 22d of July, 1861, received four writs of execution against Franklin P. Haynes, the plaintiff in this suit, and levied them upon the goods and stock in trade of the plaintiff, and after advertising said goods for fourteen days, proceeded to sell the same at public auction, and charged the following schedule of fees for his services:

No. 1.	Travel and levy of execution A. H. Tucker & Co. *v.* Haynes,	$0.24
2.	Travel and levy of execution W. Gillett *v.* Haynes,	2.54
3.	" " " John P. Dix *v.* Haynes,	3.07
4.	" " " S. Atherton *v.* Haynes,	1.49
5.	Paid W. Gillett for keeping and storing goods,	2.00
6.	Paid H. B. Ballou, for 9½ days service selling goods at auction, and expenses,	15.25
7.	Paid Henry O. Gillett, for 9 days services at sale,	7.00
8.	To preparing and posting advertisements of sale,	2.50
9.	To my own services 9½ days selling goods at auction, at $1.50 per day,	14.25
10.	To making returns on four executions,	4.66
		$53.00

It was agreed, that the whole sum was charged and received by the defendant in good faith; that it has been the uniform custom among sheriffs and constables in Windham county for a period of years to make similar charges, and that if entitled to make the charges [Nos. 6, 7, 8, 9 and 10,] they were reasonable in amount.

The court, upon the statement of facts agreed to by the parties, at the April Term, 1863, BARRETT, J., presiding, rendered judgment, *pro forma*, for the defendant. Exceptions by the plaintiff.

Butler & Wheeler and *T. H. Streeter*, for the plaintiff.

Charles N. Davenport, for the defendant.

PIERPOINT, J. Two questions are presented for our consideration upon the case as made up by the parties.

1st. Did the defendant, as deputy sheriff, charge and receive illegal fees, within the meaning of § 17, ch. 125, G. S.? and if he did,

2d. Did he do it with that knowledge of the illegality of the act, that is necessary to constitute an offense under the statute, and subject him to the penalty?

The first question is one, that in view of its importance, the peculiar phraseology of the statute regulating the subject of fees, and the construction that was put upon this statute by the court in *Henry* v. *Tilsen*, 17 Vt. 479, we are not now prepared to decide.

But as we all concur in the opinion, that a decision of the second question must always determine the fate of this case, it is thought best to decide it upon that point, rather than to subject the parties to the delay and expense of further litigation, to settle a question, which, decided either way, cannot affect the ultimate decision of the case.

The language of the statute is, that "if any officer, or other person, shall receive any greater fees than is provided for by law, he shall pay," &c. The 17th section of the statute in its terms imposes the penalty upon all who receive a greater amount of fees than is provided for by law, without any reference to the question whether it is done intentionally, or with a knowledge of its illegality. Yet the court in *Henry* v. *Tilsen*, above referred to, have very clearly shown that by the true reading of the said section, when taken in connection with the preceding sections, as well as upon every sound principle applicable to such cases, it is necessary that the officer receiving such fees should do it with a knowledge of the illegality of the act to constitute it an offense, subjecting him to the penalty.

Now in this case the offense, if any, consists not in the taking by the defendant of more than is allowed by law for services, for which a specific fee is given by the statute, but for charging and taking pay for services that are not enumerated in the statute, and for which no fee is directly given. Whether he had the right to charge and take pay for such services, is a question, as before remarked, that is not readily determined. There seems to be a diversity of opinion on the subject among officers, and also in the legal profession in the state.

It is agreed in the statement that the amount taken by the defendant for the services performed, is but a reasonable compensation

therefor, if he was entitled to take anything. It is also agreed that it has been a uniform and universal custom among officers in this county, for years, to charge for such services, and that the defendant received the amount in good faith, believing it was legal and proper for him to do so. Upon such a state of facts, it is very clear that it cannot be said that he received the money knowing that it was illegal, and that he was violating the statute.

There was no intent on his part to do wrong, and violate the law, and the intent is the very essence of all penal offenses. The intent may be, and generally is, presumed from the act itself; but here it is agreed there was no illegal intent, but on the other hand the defendant supposed he was doing only what he had a legal right to do. We think, therefore, he cannot be subjected to the penalty sought to be imposed upon him.

Judgment of the county court affirmed.

Danforth May v. The Town of Jamaica.*

Pleading. Taxes. Town. Jurisdiction. Appeal.

A plea by the *town* that the money which the plaintiff is seeking to recover, was collected of him by the constable, named, upon a rate bill and warrant duly issued, &c., would not give the county court appellate jurisdiction, where it did not exist upon other ground.

Pierpoint, J. This suit was commenced before a justice of the peace. The writ contained only the common counts of *indebitatus assumpsit*, demanding ten dollars damages, and the *ad damnum* was ten dollars.

The defendant pleaded the general issue and a special plea of justification on the ground that the money which the plaintiff was seeking to recover in this action was collected of him, the plaintiff, by William H. Carr, the constable of the defendant town, upon a legal rate bill and warrant, duly issued by the selectmen of the said defendant town for the purpose of collecting the town and state taxes, &c.

* This case was argued at the February Term, Windham County 1864, and the opinion delivered at the General Term, November, 1864.

Judgment having been rendered by said justice for the plaintiff, the defendant appealed.

The appeal was on motion of the plaintiff dismissed for want of appellate jurisdiction, and exceptions were taken by the defendant, and the only question here is, whether upon the declaration and pleadings the suit was appealable.

As neither the *ad damnum* in the plaintiff's writ, nor the sum demanded by the declaration, exceeds the sum of ten dollars, the suit clearly is not appealable unless it is made so by the defendant's special plea.

It is claimed that the plea brings the case within the excepting clause in the 70th section of the act relating to justices of the peace, which allows an appeal "when the defendant shall *bona fide* plead in excuse or justification that he was acting as a *public officer* under, or by virtue of any tax bill, or military warrant."

The same class of questions to a great extent would arise upon the trial of this case, that would have arisen if the action had been brought against the constable; still to warrant us in extending the same right of appeal to the one case as the other, we must be able to see that the case comes within the true spirit and meaning of the act. It is not sufficient that the reasons are as strong in favor of allowing an appeal in this class of cases as in the other; but the question is, can it fairly be said that the legislature did, or intended to, include within the provisions of the act cases like the present.

The language of the act is direct that to give the right of appeal, the defendant shall plead in excuse or justification that he was acting as a public officer, &c. If the legislature had intended to include any other class of persons in that provision, language so explicit in its terms, and so clearly limiting its operation, would not have been used.

The fact that in reason, cases like the present ought to be embraced within the provisions of the act allowing appeals, is a consideration that may be and perhaps ought to be urged upon the legislature, but it is one which we cannot judicially take notice of.

Judgment affirmed.

Butler & Wheeler, for the defendant.

A. Stoddard, for the plaintiff.

William Stow v. George W. Black.

Book Account. Trespass.

Damages for trespass cannot be adjusted in the action of book account unless the parties mutually agree to treat the *tort* as matter of contract.

In this case the county court correctly found from the auditor's report that the parties had made no such agreement.

Book Account. The auditor allowed the plaintiff's account as presented. The defendant presented an account against the plaintiff, consisting of seven items, the two last of which were disallowed. The other five the auditor found were for trees and timber which the defendant claimed the plaintiff cut on the defendant's land in the winter and spring of 1855. There was a dispute between the parties as to the location of the division line between their farms, which were adjoining. A suit in trespass for such cutting was commenced by the defendant against the plaintiff, and was entered in the county court at the April Term, 1862. On the 3d day of September, 1862, and while said trespass suit was pending, the parties executed an agreement to submit the location of said division line to Marvin W. Davis and Lewis Locke, who made their award in the matter.

Soon after the work, as charged in the plaintiff's account, was performed, in Nov. or Dec. 1860, the defendant claimed of the plaintiff that he should be allowed for the trees cut on his land, as he claimed, by the plaintiff, and the plaintiff replied that when the line was run out, if he had cut timber on the defendant's land he would pay him for it, but he had not cut on his land. The parties afterwards, in 1861, agreed on John A. Farnsworth and John Adams to determine the division line between them, but they did not act. Soon after this the plaintiff said to Farnsworth that he had not cut any trees on the defendant's land, but if he had he was willing to pay him for it; said he knew where the line was; and the plaintiff meeting the defendant soon after this, said to him, "I want this matter (referring to the claim for such cutting) settled, and if you do not sue me I shall sue you."

The plaintiff offered to prove that the division line so established by Davis and Locke was not the true division line between said farms at the time of such cutting; that the true line run further east,

and by it all the trees cut as aforesaid would have been on the plaintiff's land, and not on the defendant's land; and insisted that the parties were bound by the submission to Davis and Locke only in reference to said trespass suit. This testimony was objected to by the defendant and excluded by the auditor, to which decision the plaintiff excepted.

The plaintiff objected to all of the defendant's account and the testimony in relation thereto, except items Nos. 6 and 7, as not being proper items to be settled in this action, and also insisted that they were barred by the statute of limitations.

The auditor found that if from the foregoing facts the court was of the opinion that the defendant could recover in this action for the timber and trees cut on his land as aforesaid by the plaintiff, then there was a balance of two dollars and twenty-three cents due from plaintiff to defendant to balance book accounts between them; otherwise there was forty-nine dollars and seventy cents, due from the defendant to the plaintiff.

The court at the September Term, 1863, BARRETT, J., presiding, disallowed defendant's account, upon the ground that on the facts reported relating thereto, it could not be legally adjusted in the action of book account. To which decision the defendant excepted.

———, for the defendant.

Assumpsit lies for goods tortiously taken and sold for money. *Gilmore* v. *Wilbur*, 12 Pick. 120; *Chauncy* v. *Yeaton*, 1 N. H. 151.

The facts reported show that there was an understanding between the parties, that when it was ascertained how much timber was cut on defendant's land, the value thereof should be allowed and deducted from the plaintiff's claim. This must have been the intention of the parties at the time of the reference. *Hill* v. *Davis*, 3 N. H. 384.

C. B. Eddy, for the plaintiff.

I. In the disallowance of the items of defendant's account for "trees and timber" claimed by the defendant to have been cut on his land by the plaintiff, there was no error.

1. The cutting of the trees and timber by the plaintiff,—if any were so cut,—was not by virtue of any contract between the plaintiff and defendant.

2. The plaintiff was, as to the defendant, a *tort feasor*, and liable only in an action of trespass. *McCrillis* v. *Banks et ux*, 19 Vt. 442; *Stearns* v. *Dillingham*, 22 Vt. 624; *Hassam* v. *Hassam*, 22 Vt. 516; *Peach* v. *Mills*, 14 Vt. 371; *Winn* v. *Sprague*, 35 Vt. 243.

II. Defendant could not waive the *tort*, and adjust this claim in an action of book account, except by a *mutual agreement* of the parties to do so. Cases above cited. I. Par. Con., p. 399; Chitty on Con., p. 39.

The question arising on the report whether there was such an agreement, is a question of fact, and the county court having determined it, their decision cannot be revised by this court. *Birchard et al.* v. *Palmer*, 18 Vt. 203; *Stone et al.* v. *Foster*, 16 Vt. 546.

ALDIS, J. If the defendant's claim for the damages he is entitled to recover for the cutting of his trees, is to be treated as a matter of contract, then it may properly be adjudicated upon in this suit. If so there is a balance due the defendant; if not, then there is a balance due the plaintiff.

The act for which the damages are allowed was in the outset a trespass. It can only be turned into a matter of contract by the mutual agreement of both parties. Does such an agreement appear upon the auditor's report?

The plaintiff's remark, "When the line is run out if I have cut timber on your land I will pay you for it, but I have not cut on your land," is as referable to an intention to pay damages for the trespass, as to an intent to have his liability stand on contract. More so. For he does not admit any liability, nor enter into any contract to run the line and settle the damages. His expression to the defendant afterwards, "I want this matter settled, and if you do not sue me I shall sue you," seems to point to a suit to be brought between them in which the claims on both sides might be adjusted, and that could only be by an action founded on contract, and by treating the claim of damages as matter of contract. But the auditor on this evidence does not find the fact that the parties did agree to so treat it. The defendant afterwards sued in trespass, and does not appear to have agreed to waive his claim against the plaintiff as a *tort feasor*,

Upon these facts the court below, in passing upon the auditor's report, did not find that the parties had agreed to treat the tort as matter of contract, but finds the contrary. Upon this finding (which I think was fully warranted by the report) the court below disallowed the defendant's account, as still being a claim for damages arising from a trespass. In this there was no error.

Judgment affirmed.

HENRY HOLMES *v.* BENJAMIN H. BRIDGMAN, *Administrator of* ELIZABETH WOOLEY.

Administrators. Fraud.

If an administrator neglects to seek redress from persons wrongfully withholding the property of the estate which he represents, being deterred therefrom by the wrongdoers' giving him a bond of indemnity against all acts or omissions to act as administrator, he is guilty of collusion with them, and liable for the amount lost to the estate by his bad faith.

If an administrator, after a thorough investigation of the matter, honestly though erroneously believed that certain notes of the intestate were given away by him before his death, and for this reason did not attempt to obtain them or their proceeds, he would not be liable for the amount so lost to the estate. *Aliter*, if he is wanting in due diligence in his investigations.

THIS was an appeal from the probate court in decreeing that the defendant was guilty of bad faith and wanting in due diligence as administrator of the estate of Elizabeth Wooley; and was chargeable for the property which he would have received as administrator by the exercise of reasonable diligence and good faith, as set forth in the opinion of the court.

The county court appointed a commissioner to report the facts, who found them as follows:

In March, 1849, Samuel Wooley Sen. died, leaving a farm worth $2700. Previous to his decease, he had given all his personal property to his son, and only heir, Samuel Wooley Jr., with the exception of certain notes. It was contended that these notes were also given and delivered to Samuel Jr. by his father in his lifetime. The commissioner

did not find the fact of such gift and delivery established by any fair preponderance of proof, but found that Samuel Wooley Sen. died the owner of good notes to the value, at the time of his decease, of $550.00, which notes were subsequently all collected, with interest, by Samuel Jr., or by his administrators Anna and Franklin A. Wooley. At his decease Samuel Wooley Sen., left surviving him said Samuel Jr., his only heir, and a widow Elizabeth Wooley. The widow Elizabeth at her husband's decease was aged and infirm in mind and body, and incapable of doing any business, or making any contracts. Samuel Jr. supported his mother to her satisfaction from his father's death till his own in March, 1852, and with her tacit consent took possession and enjoyed all the property of his father, real and personal, as his own. At his death the same, together with his own estate, derived from other sources, passed into the hands of his administrators, Anna and Franklin Wooley. The value of the rents and profits of one-third part of the real estate of Samuel Sen., from March, 1849, to March, 1852, three years, was, per year, $65. The support which he furnished to his mother for those three years was fairly equivalent to the use which he had of her interest in said real estate. Samuel Wooley Jr., at his decease in March, 1852, left surviving him a widow Anna Wooley and a son and only heir, Franklin A. Wooley. March 17th, 1852, Anna and Franklin were appointed administrators upon the estate of Samuel Jr., and on the same day, by the procurement of said Anna and Franklin, John Dwinell was appointed administrator upon the estate of Samuel Wooley Sen.

The widow Elizabeth lived with Anna and Frank from her son's death till November, 1852, when she was taken away from their house by one Evans, and carried to his own house, where she remained till July 11th, 1853. In November, 1852, Gideon Palmer was appointed guardian of the old lady, as an insane person; and Anna and Franklin gave him a sufficient bond as guardian to support her through life, at any other place than Evans—but they insisted from the first that they would never pay anything while she remained there. Mr. Palmer tried without success to get her away from Evans, and finding that his office was likely to prove troublesome, resigned, after about ten days' service, and December 3d, 1852, Mr.

Holmes, the plaintiff, was appointed guardian in his stead. May 4th, 1853, Dwinell, as administrator of Samuel Wooley Sen., gave to Franklin A. Wooley a lease of all the real estate of said Samuel Sen. He and his mother were already in the occupancy of said real estate and had been so from the death of Samuel Jr. June 2d, 1853, on application of Holmes as guardian, commissioners were duly appointed to set out the dower of the widow Elizabeth in her husband's real estate. The commissioners set out said dower July 5th, 1853, on which day their report is dated. Their report was returned to and accepted by the probate court August 3d, 1853—and was recorded in Grafton town clerk's office, December 14th, 1853. July 6th, 1853, Holmes went on to that part of the dower, about fourteen acres, which was mowing, and exercised slight acts of possession. Franklin and Anna Wooley knew of the setting out of the dower when it was done, but not of the acts of Holmes, of the next day. In July, 1853, and again in 1854, Franklin A. Wooley without the consent of Holmes, entered upon the mowing land of the dower, and cut and carried away grass, worth, standing, $56.00. each year. Early in July, 1853, Holmes informed the overseer of the poor of Grafton that he had no funds to support the widow Elizabeth, and that he must take care of her. The overseer and other town officials applied to Anna and Franklin, who finally gave to the town of Grafton a good bond for the support of the old lady, at certain places named and at any other to be approved by the overseer of the poor. She was supported by Anna and Franklin from the time she left Evans till her death in December, 1854. July 11th, 1853, the town of Grafton gave to Franklin and Anna Wooley a lease of all the real estate of the old lady. Neither Franklin A. nor Anna ever paid any rent to Dwinell, administrator, nor to the town, nor were ever asked to do so. Soon after his appointment as guardian, Holmes informed Dwinell, administrator, that Samuel Wooley Sen. owned certain notes at his decease in which the widow Elizabeth had an interest, and urged him to get possession of them or their proceeds, that a just part thereof might be decreed to his ward, the widow Elizabeth. Mr. Dwinell investigated the subject and came to the conclusion, honestly but erroneously, that Samuel Sen. had given and delivered all his notes to his son Samuel Jr.

Anna and Franklin insisted that such was the fact, and were in possession of them all, or their proceeds, and would not give them up. Mr. Dwinell could not have got possession of said notes, or proceeds, without an expensive lawsuit with Anna and Franklin. And he had in his possession or control no personal property of said Samuel Sen. to defray the expenses of such litigation. Dwinell rendered his administration account to the probate court December 28th, 1853, in which he gave no credit to the estate for any personal property. The account was allowed, and January 14th, 1854, Holmes as guardian took an appeal therefrom to the April Term of the county court 1854, which was duly entered and was pending at the decease of his ward. In November 1853, Holmes, as guardian, brought an action of trespass against Anna and Franklin A. Wooley, for the grass taken from the dower as before related. And in August, 1854, he brought another like suit against Franklin A. and certain of his hired men, for the grass taken from the dower in the latter year, as before related; both actions were returnable to the county court, and were pending at the decease of Elizabeth Wooley. The value of the rents and profits of one-third part of the real estate from the decease of Samuel Wooley Jr., to the time the dower was set out, was found to be $65., and the annual value of such undivided third part was found to be the same to the time of the death of the widow Elizabeth, and the yearly value of the dower as actually set out was $65. January 16th, 1855, Dr. Benjamin H. Bridgman, the present defendant, was appointed administrator upon the estate of Elizabeth Wooley, by the procurement of Anna and Franklin A. Wooley. And thereupon Mr. Holmes made similar representations to him as he had done to the administrator Dwinell, with regard to notes owned by Samuel Sen. at his decease, and urged him to go forward with the proceedings commenced by him as guardian to obtain for the widow Elizabeth her just rights in the estate of her husband. Dr. Bridgman gave no decided answer at first, but promised to investigate the subject. Mr. Holmes rendered his guardian account, which was allowed by the probate court, August 1st, 1855, in which he was allowed a balance due him as such guardian for services and expenses of $245.65 Commissioners were appointed to adjust the claims against the estate of Elizabeth Wooley, and their report was returned to and accepted

by the probate court, September 10th, 1855, by which a claim of Mr. Holmes was allowed of $252.28, being the balance due him on the settlement of his guardian account with interest. Administrator Bridgman appealed from the commissioners' report to the April Term of the county court 1856, and failing to enter his appeal the judgment of the probate court accepting said report was affirmed at that Term. Dr. Bridgman returned no inventory of the estate of Elizabeth Wooley. January 13th, 1856, Anna and Franklin A. Wooley gave a good bond to Dr. Bridgman, to indemnify him against all his acts or omissions to act as administrator of Elizabeth Wooley. Both before and after the giving of said bond, Holmes urged Dr. Bridgman to allow the use of his name to prosecute said two trespass suits, and said appeal from the allowance of administrator Dwinell's account, and April 7th, 1856, tendered to him a sufficient bond of indemnity. After both bonds were delivered, Dr. Bridgman finally refused to allow his name to be used for the prosecution of either of said three suits, and this refusal was made in consequence of the bond given to him by Anna and Franklin, and without such bond he would have permitted Mr. Holmes to proceed with the suits as he desired. After receiving said bond from the Wooleys he ceased to do any act as administrator, and the whole litigation subsequent to that time on the part of the defendant has been by Anna and Franklin A. Wooley and at their expense.

April Term, 1856, judgments of nonsuits in both trespass suits were rendered against Holmes, and executions for costs issued against him. And April Term, 1857, the judgment of the probate court allowing administrator Dwinell's account was affirmed for want of prosecution, and judgment for costs rendered against Holmes, and execution issued. The executions in the trespass suits were paid by Holmes, April 22d, 1857, amounting at that time to $34.90., and July 10th, 1857, he paid the execution in the appeal case, being $26.38.

Upon the report of the commissioner the court, at the September Term, 1862, BARRETT, J., presiding, *pro forma*, rendered judgment for the defendant, to which the plaintiff excepted.

Butler & Wheeler, for the plaintiff.

The defendant was guilty of bad faith toward Holmes, the only

creditor, gross neglect of his duty as administrator, and a prostitution of his office entirely to the interests of Franklin and Anna Wooley, which were directly opposed to the interests of the estate he represented, and should be charged with all the estate has lost by reason of his neglect. Packman's case, 6 Coke 19; *Eames' Adm'r*, v. *Creditors*, 4 Vt. 256.

This is the only remedy the creditor can make available against the administrator and his sureties. *Bank of Orange County* v. *Kidder*, 20 Vt. 519; *Probate Court* v. *Chapin*, 31 Vt. 373.

The estate lost one-third of the $550. in notes left by Samuel Wooley Sen., at his decease, and interest thereon, by the neglect and refusal of the defendant to prosecute the Dwinell appeal.

The widow's right to one-third of these notes did not depend at all upon an assignment to her by the probate court during her lifetime. She took by force of the statute of distributions, and her interest vested immediately upon the decease of her husband. Fuller on Errors, 384, 341; 3 Peere Williams 49; 4 Bac. Ab. 95; 1 Burrow's Rep. 87.

No formal possession by her or her guardian was necessary to maintain the trespass suits. The setting out by the commissioners was sufficient. She took the seizin of her husband by appointment of the law. But if possession was necessary, that taken by Holmes as guardian was sufficient. 4 Mass. 384; 1 Wash. R. P. 254; *Ib.* 168 § 25.

The lease from Dwinell could not have been made to operate as a bar to either suit. C. S. 340 §5; 1 Wash. R. P. 254.

Nor could the lease from the town of Grafton give any right to the use of the dower, or in any way affect these suits. *Bennington* v. *McGennes*, 1 D. Chip. 44; 6 Vt. 100.

Her administrator might and ought to have recovered one-third of the rents and profits of the real estate from November, 1852, to December, 1854, the time of her decease, the value of which the commissioner reports to be $65. per year. He neglected and refused because of the indemnity of Franklin and Anna Wooley, the persons of whom it should have been recovered.

This was bad faith to the creditor, and the defendant should be

charged with what he could have recovered in this way, unless he is charged for what he might have recovered in the trespass suits.

H. E. Stoughton, for the defendant.

I. The course pursued by the administrator Dwinell is justifiable upon two grounds. 1st. When he neglected to institute suits he exercised a sound discretion, and hence could not be made liable. *Heirs of Holmes* v. *Holmes*, 28 Vt. 765. And if the report does not show facts sufficient to base the assumption of good faith upon, it will be re-committed. 2d. The administrator was not bound to prosecute a doubtful claim without indemnity. *Griswold* v. *Chandler*, 5 N. H. 492; *Andrews* v. *Tucker*, 7 Pick. 250.

If Dwinnell could not be made liable, then the defendant, Bridgman, cannot, for his liability for the notes is based upon the assumption of a liability which could have been enforced against Dwinell. The defendant was not bound to prosecute a hopeless suit, even though indemnified. Wyman's Appeal, 13 N. H. 18.

II. Neither of the trespass suits could be maintained. C. S., p. 363 § 11; *ib.* p. 378 §§ 4, 15; *Cutting* v. *Cox*, 19 Vt. 518; *Ripley* v. *Yale et al.*, 16 Vt. 257; *Thurston* v. *The Estate of Holbrook*, 31 Vt. 354.

III. The defendant is not liable for other obvious reasons.

1st. He had no funds, and the bond offered only covered the appeal from the allowance of Dwinell's account. 2d. If the bond would cover the trespass suits, it is sufficient to show that they could not have been sustained. 3d. And there was no bond nor any request to look for assets except through the suits then pending.

ALDIS, J. The plaintiff as a creditor of the estate of Elizabeth Wooley filed his petition in the probate court, setting forth that the defendant had neglected to file any inventory of the property of the estate and to render any account of his administration, and praying the court to cite him in to render his account, and that he be ordered to pay the debts against the estate including the claims of the plaintiff. This proceeding was according to the statute. G. S. chap. 54 § 10 *et seq.* The defendant appeared and rendered his account stating that no estate of the said Elizabeth ever came to his hands, and that he had made diligent search and inquiry for the same. Upon this

account or statement a hearing was had, the petitioner producing witnesses to show that the administrator had not used due diligence but had been guilty of fraud in the execution of the duties of his office. The probate court decided that the administrator had been guilty of bad faith and wanting in due diligence, and held him chargeable for the property which he would have received as administrator by the exercise of reasonable diligence and good faith, and ordered him to be charged with the sum of $647. lost to the estate by his bad faith, and that he pay to the petitioner on demand his claims against the estate, and that nothing be allowed the administrator for his services, they having been rendered in bad faith. From this decree and order of the probate court the administrator appealed to the county court. The county court appointed a commissioner to report the facts, and upon his report the hearing is now had. It appears from the report that Samuel Wooley Sen., the husband of Elizabeth Wooley, died in March, 1849, seized of a farm of the value of $2,700. and of good notes of the value of $550. To this result the litigation has come both before the probate court and the commissioner. It is admitted that he owned the real estate. As to the $550. in notes, the widow and heir of Samuel Wooley Jr. claim that Samuel Sen. gave them before he died to his son Samuel Jr. If he did so give them, then Elizabeth would not be entitled to her distributive share of them;—if he did not so give them she was entitled to her share of them, which could not have been less than one-third of them. If the widow and heir of Samuel Jr. wrongfully claimed and withheld them from the widow Elizabeth, she in her lifetime, and her administrator after her death and on behalf of her creditors was entitled to such share. The proof of such a gift would devolve on those who claimed title under it, (Anna the widow of Samuel Jr. and Franklin his son and heir;) and the commissioner says he does not find such gift established by any fair preponderance of proof. This result thus arrived at both in the probate and county courts we must regard as a fact which would have been established always in any just and reasonable litigation, as well by Dwinell, the administrator of Samuel Sen., by Bridgman, the administrator of Elizabeth, as by this plaintiff; and that the claim of the widow and heir was wrongful and untenable.

1. As to the claim as to the dower of Elizabeth Wooley in her husband's farm.

It is conceded that she had the right to dower. Until assignment of dower she was entitled to one-third of the rents and profits of the farm; after assignment of dower, to the use of the whole assigned to her.

While her son Samuel Jr. lived—viz. from March, 1849, to March, 1852,—he supported her reasonably, and it is admitted by the plaintiff that such support should offset the value of the use of the dower for the same time. From March to November, 1852, the widow and son of Samuel Wooley Jr. supported her, and for that time we see no reason why the use of her dower should not be set off against her support. After that she was supported by her guardian (the present plaintiff,) from November, 1852, to July, 1853, and his account against her estate appears to have accrued in part for such support;—and up to the time of her death in December, 1854, the plaintiff appears to have been endeavoring to obtain an assignment of dower for her and by suit against Anna and Franklin Wooley, (the widow and heir of Samuel Jr.,) to reach its proceeds.

After the appointment of the plaintiff as guardian it is obvious that the use and possession of the real estate of his ward would belong to him—and that the lease of it previously by the administrator of Samuel Wooley Sen., or afterwards by the town of Grafton, would not impair his right to it. As Anna and Franklin Wooley in fact took the whole use of it to themselves without the assent and against the will of the guardian, they would be liable to him for the value of its proceeds thus wrongfully taken. They knew that the land was set off to the widow as dower at the time of the assignment. Either in the action of trespass or in some other form they were accountable to the guardian for the proceeds of the use of the dower which they had taken. The defendant Bridgman, who was administrator of Elizabeth, must have been fully aware of this. The guardian, after his powers ceased by the death of the widow, urged the defendant to pursue the matter and obtain pay for this wrongful use of her land by Anna and Franklin Wooley. He promised to investigate. The commissioner finds he would have proceeded to obtain redress for the estate he represented, if Anna and Franklin Wooley, the wrongdoers,

whose interest it was to have him do nothing, so that they could retain the widow's funds in their hands, had not given him a bond to indemnify him against all acts or omissions to act as administrator. This bond we can regard only as an instrument to procure him not to do the duty reposed in him by his office. It was collusion in their wrongdoing for him to accept it and act upon it. If he did not act, nobody could. The obligors in the bond thereby secured themselves from legal prosecution and got for their own use what really belonged to the estate of the widow, and should have gone to the payment of her creditors. In this view we do not deem it material to decide whether the assignment of dower would relate back to the time when the commissioner set it out and the guardian made entry, so as to enable him to sustain his first suit in trespass—though we incline to that opinion; for the defendant wholly refused to do anything—to take any measures to secure to the widow's estate what belonged to it. The commissioner says, after taking the bond he ceased to do any act as administrator. He allowed Anna and Franklin to grasp the whole without any respect for the rights of others who had claims on the estate. He did this because they gave him a bond, that if he would do nothing, and so help them keep what they had got, they would stand between him and harm. This conduct of the defendant was very far from being fidelity to his trust—it was collusion with wrongdoers in spoiling the estate he was bound to protect.

Had he done his duty he would have collected from Anna and Franklin the value of the use of the dower from November, 1852, to December, 1854. Her right to the value of the use of her thirds in her husband's real estate did not depend upon the assignment of dower by metes and bounds. Nor could her husband's administrator, heirs or creditors deprive her of that. And after the appointment of her guardian all her rights vested in him, and those who took the proceeds were accountable to him.

The annual value of the dower according to the commissioner was $65. By this estimate the administrator of Elizabeth Wooley could have collected of Anna and Franklin something over $130.00.; or if the estimate be measured by the damages in the trespass suits, then at least $112.

2. As to the personal property.

The commissioner reports that the $550. in notes belonged to Samuel Sen. when he died, and as we have already said, this result must have been arrived at if any reasonable litigation had been attempted. The administrator of Samuel Sen. by the use of due diligence could have ascertained the facts and secured this property for the estate. For his neglect to do so two reasons are assigned. *First*, that he honestly but erroneously believed that these notes had been given to the son. If the facts reported by the commissioner satisfied us that he honestly and *thoroughly*, and without favor to Anna and Franklin Wooley, investigated the matter, and so had arrived at that conclusion, we should not think he ought to have been held liable for the loss of them. But there are other facts which raise a strong presumption against him, and lead us to a different conclusion, viz: that he was at least wanting in due diligence. He was appointed administrator at the suggestion of the widow and heir of Samuel Jr. He could as well have investigated the matter and ascertained the facts as this plaintiff. He was urged to do so, and as events have since shown, would have succeeded if he had tried. He seems to have relied upon the declarations of Anna and Franklin, whose statements were less to be relied on as they were interested parties. We cannot resist the impression from the facts stated in the report that he allowed himself to be influenced by them to do nothing, which was all they wanted, when his duty required that he should be independent and diligent in pursuing them and reclaiming what they had wrongfully got.

The second excuse offered for him is that he had no funds to enter upon an expensive litigation. But he had the farm worth $2700., and the proceeds of two-thirds of it. Instead of keeping this in his own hands he leased it to the widow Anna and her son Franklin and seems never to have asked for any rent. This looks much more like managing to aid them in their claims, than endeavoring to bring them to the test of a legal investigation. An investigation in the probate court would not have been attended with an unreasonable expense,—at least would seem to have been fully justifiable as a duty to the estate he represented. The farm furnished him with ample security for all his expenses.

When Dwinell, as administrator of Samuel Wooley Sen., offered

his account for allowance, the plaintiff objected to the allowance, because he did not account for this sum of $550. Had *that* investigation been then allowed to proceed, we cannot doubt it would have resulted in charging him with these notes. But here again the investigation was prevented by the act of this defendant. He took a bond in collusion with those who wrongfully held the fund to stifle investigation. Thus from first to last we find a persistent effort to avoid a legal trial. Against those thus unfaithful to their trust, and who thus collude to stifle all legal investigation of unjust claims, every presumption is to be made. We think the defendant should be made chargeable with the third of the $550. of notes which belonged to Samuel Sen. at his decease. This sum, with interest from March, 1849, belongs to the estate of the said Elizabeth, and at the time of the allowance of the plaintiff's account (September 10th, 1855) was more than enough to pay it. The amount chargeable to the defendant for the use of the dower would be more than the other claims of the plaintiff;—it would be (calling the period two years during which Franklin and Anna had what they should have accounted for to the guardian) the sum of $130. with interest from December, 1854. The plaintiff paid on the 22d of April, 1857, $34.90. on the executions in the trespass suits, and on the 10th of July, 1857, $26.88., the costs in the appeal case. These claims of the plaintiff with interest amount to less than the rents and profits of the dower for which we hold the defendant chargeable.

We think the decree of the probate court charging the defendant with an amount equal to the claims of the plaintiff, as above stated, was correct and should be affirmed. The *pro forma* judgment of the county court is reversed and judgment rendered that the defendant is chargeable with loss to the estate of Elizabeth Wooley, deceased, arising from his want of due diligence and his fraud, for a sum equal to the account of the plaintiff allowed against said estate, (being $252.28. with interest from September 10th, 1855,) and the sums paid by the plaintiff on the executions in the trespass suits, (being $34.90. and interest from April 22d, 1857,) and the sum paid for costs in the appeal case, (being $26.38. with interest from July 10th, 1857,)—and that the decree of the probate court ordering the defendant Bridgman to pay the above amounts to the plaintiff be affirmed

with costs. As Bridgman has deceased since this suit has been pending, and Joel Davis has entered as administrator of his estate, he will be ordered to pay the same to the plaintiff out of the estate of said Bridgman. This judgment is to be certified back to the probate court, pursuant to the statute.

Hunneman & Co. v. Fire District No. 1 in Jamaica.

Pleading. Evidence. Corporation. Agency. Fire District.

If a defendant corporation in a book account action would deny its alleged corporate existence the question should be raised by plea before judgment to account is rendered.

It appeared from the records of the defendant fire district, that at a certain meeting of the district, after choosing a moderator, it was voted to adjourn to another place in the district, where the district proceeded to transact other business. The defendant offered to prove by parol that at said meeting, the district met and voted to adjourn "without day" before transacting any other business, and thereupon the members of the meeting dispersed, and subsequently, on the same evening, and late, after many voters had retired, a few voters of the district got together and did the business recorded, and that the clerk neglected to record the first vote to adjourn. *Held*, that this evidence was properly rejected by the auditor.

One article in a warning of a meeting of the defendant fire district read as follows: "To see if the district will vote to purchase a fire engine, hooks and ladders and buckets, or any portion thereof, for protection against fire, and to raise money to defray the expense of the same, or for any other purpose." At the meeting it was voted, among other things, "to choose an agent to purchase whatever of fire apparatus the district may vote to buy;" "that $500. be appropriated to defray the expenses and preparation of suitable fire apparatus for the use of this fire district;" and it was further voted, "that the agent be instructed to expend a sum not to exceed $1,000. which shall include fire apparatus and reservoirs, and all things necessary for the protection of the district from fire." The plaintiffs had a copy of the proceedings of this meeting. *Held*, that the article in the warning was sufficiently definite and certain to support the votes.

Held, also, that the district had the right to make contracts by an agent for the purposes contemplated in said votes.

Held, further, that the agent appointed, in purchasing a fire engine and apparatus with it to the value of $750. did not exceed the authority conferred upon him, and his acts are binding upon the district. Peck, J., dissenting.

Book Account. The plaintiffs' account was for a fire engine and certain other articles charged at $758. with interest from August 1st,

1862, to April 15th, 1863, $17.05, making in the whole $775.05, which was allowed by the auditor subject to the opinion of the court upon the following facts, which were proved:

On the 16th day of January, 1856, Benjamin Muzzy and I. P. Kendall, two of the selectmen of the town of Jamaica, pursuant to an application signed by twenty or more freeholders resident in the village of Jamaica and vicinity, proceeded to set out and establish a fire district in said town, to be called "Fire District No. 1, in Jamaica."

The board of selectmen consisted of three members. No evidence was offered tending to show that the other selectman acted in the matter of establishing said fire district. The selectmen so acting in the premises left their proceedings in the town clerk's office, to be there recorded, on the 19th of January, 1856. On the 16th of January, 1856, said Benjamin Muzzy and I. P. Kendall warned a meeting, as selectmen, of the legal voters of "Fire District No. 1, this day established," to meet at the town house, in said district, on the 25th day of January, 1856, at 6½ o'clock, P. M., to organize said district. The legal voters met pursuant to notice, and chose a moderator, clerk, and prudential committee.

The next meeting of the fire district was warned on the 29th of December, 1856, and holden on the 5th day of January, 1857, when, according to the records, after electing a moderator, it was voted to adjourn to the office of B. C. Knowlton in said district, where other business was transacted.

The defendant offered to prove by parol, that at the meeting last above mentioned, the district met and voted to adjourn "without day," before transacting any other business, and thereupon the members of the meeting dispersed, and subsequently on the same evening, and late, after many voters had retired to bed, a few voters of the district got together and did the business recorded, and that the clerk neglected to record the first vote to adjourn. This evidence was objected to by the plaintiffs, and excluded,—to which the defendants excepted. Other meetings were warned and holden from time to time. On the 30th day of December, 1861, a meeting was warned by Elliot E. Kellogg, clerk, to be holden on the first Monday in January, 1862. The third article in the warning is as follows: "To see if the district will vote to purchase a fire engine, hooks and lad-

ders, and buckets, or any portion thereof for protection against fire, and to raise money to defray the expense of the same, or for any other purpose." At this meeting the fire district, among other things, voted, "That a committee of three be appointed by the chair to enquire into and report the number of reservoirs and their location, necessary for the use of the village. Also the number of fire hooks and ladders necessary for the same purpose, and their cost, and also the cost of a suitable fire engine; said committee to report at an adjourned meeting." After appointing a committee of three persons, it was voted to adjourn three weeks. The defendant fire district met pursuant to adjournment, and, after hearing the report of the committee, (which contained statements and estimates in detail, of the probable cost of a suitable fire engine, reservoirs, and other apparatus for extinguishing fires;) among other things, voted—"To choose an agent to purchase whatever of fire apparatus the district may vote to buy." "Chose C. D. Read, said agent." Voted, "To appoint a committee to locate and build suitable reservoirs, also to be advisory with the agent." "B. Muzzy, J. E. Butler, and D. H. Rice were appointed said committee." It was further voted, "That $500. be appropriated to defray the expenses and preparation of suitable fire apparatus for the use of this fire district.

And it was also further voted, "That the agent be instructed to expend a sum not to exceed one thousand dollars, which shall include fire apparatus and reservoirs, and all things necessary for the protection of the district from fire." Read was present when chosen agent and accepted the office. After his appointment, and before the purchase hereinafter mentioned, Read visited Boston and conferred with the plaintiffs, who were manufacturers of and dealers in fire engines, &c., and ascertained from them the prices for which different engines, hose, &c., could be procured. Upon his return to Jamaica Read advised with John E. Butler about the kind of fire engine it was expedient to purchase, but did not advise with Benjamin Muzzy, who was out of town, nor did he advise with D. H. Rice, the other member of the "advisory committee," personally, but was informed by Mr. Butler that Rice approved of the purchase of the same kind of an engine as was afterwards obtained. While Read was in Boston he gave the plaintiffs a copy of the proceedings of the meeting

at which he was chosen agent, and on or about the 20th of June, 1862, he, as agent of the defendant, sent to the plaintiffs a written order for the fire engine and other articles charged in the plaintiffs' account. And the plaintiffs soon after forwarded the same by railroad to Brattleboro depot, from which they were taken to Jamaica village, but by whom did not appear. At the meeting holden on the first Monday in January, 1862, a prudential committee of said fire district were chosen. Read did not advise with any of the members of the prudential committee about the purchase of the plaintiffs. In point of fact the committee were opposed to the purchase of this property of the plaintiffs, and when delivered at Jamaica village refused to accept of any portion of it, and never have accepted it. The prudential committee did not express any dissent to the purchase by Read until after it was completed, nor did they have any opportunity to do so; yet Read supposed they were not in favor of it.

The listers of Jamaica never made any designation of any portion of the real estate, or other property subject to taxation to fire district No. 1, and no tax has ever been voted or assessed upon any grand list, to defray any expenses of the district.

The court at the April Term, 1863, BARRETT, J., presiding, accepted the report, and gave judgment *pro forma*, in favor of the plaintiffs for the sum found due by the auditor,—to which judgment the defendant excepted.

A. Stoddard and *E. E. Kellogg*, for the defendant.

Butler & Wheeler, for the plaintiffs.

KELLOGG, J. This is an action on book account, and it comes to this court upon exceptions taken by the defendant to the judgment of the county court in favor of the plaintiff on the auditor's report.

The first question insisted upon by the defendant is a denial of its legal existence as a corporation. No question in respect to the defendant's legal existence was raised by plea, and we think that, after a judgment to account, it is too late to make any objection to further proceedings in the suit on this ground. The auditor is not the proper tribunal to try the question whether there is such a corporation as the defendant in existence. His duties are to "hear, examine, and adjust the accounts between the parties;" and, if the defendant would deny its alleged corporate existence, the question

should be raised by plea, before judgment to account is rendered. By submitting to a judgment to account, a defence to the suit on this ground should be considered as waived. If no such corporation is in existence, the defendant cannot be prejudiced by the taking of the account, nor by any judgment rendered thereon. In that case, the judgment would be a mere nullity, and ineffectual for any purpose; and the plaintiffs would take it at their own risk, *quantum valeat*. In this view of the matter, we have not regarded the alleged irregularities in the organization of the fire district as being entitled to consideration. In the absence of any plea putting in issue the proper existence of the fire district as a corporation, we think that sufficient appears in the auditor's report to show that it is a corporation *de facto*, and to warrant proceedings against it as such.

We think that the auditor properly rejected the proof offered in respect to the adjournment of the meeting held on the 5th of January, 1857, because the effect of the testimony would be to add to and alter the record of the proceedings of that meeting, and the fact sought to be established by the testimony would, if proved, have no bearing on any question properly before him on the hearing.

The inhabitants of any fire district are authorized, at any legal meeting, to vote a tax on the grand list of the persons and property within the district for the purpose of protecting the property within the district from damage or destruction by fire. Acts of 1854, No. 7, § 6; (G. S., p. 122, § 171.) This authority to raise money by taxation is plenary and unrestricted. The purchase of engines, hose, and other fire apparatus is one of the chief objects sought to be attained in the organization of fire districts; and the statute has left the powers of the district wholly unlimited in this respect, but it has provided that the prudential committee of the district shall not have power in any case to bind the district for the payment of any greater sum of money than shall have been already voted or collected. (Acts of 1860, No. 26, § 2.) This is a limitation merely on the discretionary power or authority of the prudential committee, but it is no limitation on the powers of the district as a corporation.

The section of the act of 1860 in relation to the duties of the prudential committee provides, among other things, that they shall have power to make all needful contracts, and expend the moneys of the

district in such manner, for the preservation of property in such district from damage or destruction by fire, as they shall deem necessary, and to draw orders on the treasury therefor. The purchase of a fire engine and the instruments or apparatus used with it was a transaction clearly within the scope of the corporate power conferred by the statute on fire districts, and the power to raise taxes for the purpose of protecting property in such districts from damage or destruction by fire implies the power to make such expenditures as are necessary and proper to effect that purpose, except in cases in which the exercise of this power is restricted or restrained by statute. The only restriction upon the mode in which a fire district may make contracts is contained in the Acts of 1857, No. 36, § 1, (G. S. p. 128, § 22,) and this, in terms, is applicable only to purchases of real and personal estate "necessary for the protection and preservation of the engine, hose, and other fire apparatus of the district," and "the apparatus for extinguishing fires," mentioned in that section, is referred to only for the purpose of limiting and defining the amount of *other* property which fire districts may take and hold. As to a person with whom it contracted a pecuniary liability arising on contract, a fire district, being not otherwise limited in respect to its power to enter into the contract, or to the persons through whom that power should be exerted, would stand on the same footing with a private corporation or an individual; and it might accordingly make a contract by an agent chosen by a vote of the district for that purpose. Angell & Ames on Corp., 22, 266.

We think that the third article in the warning for the meeting of the district which was held on the first Monday of January, 1862, was sufficiently definite and certain to support the votes of the district at that meeting in respect to procuring apparatus for extinguishing fires, and the appointment of an agent to purchase the same. *Dix et al.* v. *School District No. 2 in Wilmington*, 22 Vt. 309; *Moore* v. *Beattie*, 33 Vt. 219. The appointment of a committee of three persons to "be advisory with the agent" did not limit the power expressly conferred upon the agent, and we think that the terms of the vote under which that committee was appointed very strongly imply that the duties of this committee were intended to be, in respect to the agent, *advisory* only. The agent was appointed by the vote of

the district "to purchase whatever of fire apparatus the district may vote to buy; and the district thereupon voted, (1.) "that $500. be appropriated to defray the expenses and preparation of suitable fire apparatus for the use of the district," and (2.) "that the agent be instructed to expend a sum not to exceed $1000., which shall include fire apparatus and reservoirs, and all things necessary for the protection of the district from fire." By these votes, the district conferred upon the agent an authority to pledge its credit which was not conferred by the statute on its prudential committee; and this special authority could as properly be conferred on an agent appointed for that purpose as upon the prudential committee. If the district had voted to confer this authority upon its prudential committee, that committee would, *quoad hoc*, have been merely special agents of the district. The chief question in the case is whether the agent exceeded the authority which the district conferred upon him; and this question is dependent wholly on the construction and interpretation of the votes of the district. It is not claimed that the contracts of the agent exceeded the limit specified in the last vote, and that vote clearly authorized an expenditure of a sum not exceeding one thousand dollars in the whole "for fire apparatus and reservoirs, and all things necessary for the protection of the district from fire." We think that this vote enlarged the authority conferred by the first vote, and that the agent, in ordering of the plaintiffs the fire engine and other articles charged in their account, acted within the power conferred upon him, and that his proceedings were binding on the district. The plaintiffs do not appear to have been informed that the prudential committee or any other persons in the district disapproved of the acts of the agent, and were justified in dealing with him as the agent of the district so long as he acted within the authority conferred upon him.

Judgment of the county court for the plaintiffs affirmed.

PECK, J., dissented, on the ground that the agent exceeded his authority, and that the exact extent of his authority was known to the plaintiffs at the time of giving them the order for the fire engine and the other articles which are charged in their account against the district.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF WINDSOR,

AT THE

FEBRUARY TERM, 1864.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUSTICE,
HON. JOHN PIERPOINT, }
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.
HON. ASAHEL PECK, }

ISAAC TAGGART *v.* LUTHER RICE.

Promissory Note. Consideration. Payment. Counter-claim.

The plaintiff's evidence tended to prove that, upon the defendant's request the plaintiff received of the defendant two notes against the defendant's son, and $100. to be paid to a creditor of the defendant's son, and gave his note to the defendant for the amount of the two notes and the $100., after deducting $30. which the defendant owed the plaintiff for a colt; that this was done upon the repeated assurance of the defendant that the plaintiff should not lose by the transaction; that the defendant promised the plaintiff not to call on him for payment until he should have collected it of the son; that the plaintiff made a small payment on said note, and then took it up by giving a new note for the balance payable on demand; that the defendant transferred the new note to R. who called on the plaintiff for payment, and he paid the amount without attempting to defend against it. *Held*, that the plaintiff's evidence did not show a case of voluntary payment of a note legally invalid for want of consideration.

Instead of the plaintiff's evidence making a case of no consideration in the note, it was a case of an independent counter-claim on the part of the plaintiff against the defendant, and as such the plaintiff was not bound to set it up in defence, or lose it.

ASSUMPSIT. The declaration contained a special count covering the whole cause of action, and the common counts. Plea, the general issue. Trial by jury, December Term, 1862, BARRETT, J., presiding.

The special count and the plaintiff's evidence, together with a claim of the defendant's counsel upon the trial, and the charge in respect thereto, are substantially set forth in the opinion of the court.

Verdict for the plaintiff. Exceptions by the defendant.

Washburn & Marsh, for the defendant, maintained that the plaintiff could have successfully resisted payment of the note to the defendant on the ground of the want of consideration, and having voluntarily paid the same, he cannot recover back the same money in this suit; and that the court should have charged as requested, and that the charge as given was erroneous; and cited upon the point that there was no consideration, *Mills* v. *Wyman*, 3 Pick. 207; 1 Pars. on Cont. 356–7–8–9, and note *h*; *Burnet* v. *Bisco*, 4 Johnson 235; *Geer* v. *Archer*, 2 Barb. 420; and upon the point that the money paid voluntarily cannot be recovered back in this action, *Stevens* v. *Head*, 9 Vt. 174.

A. P. Hunton, for the plaintiff, maintained that there was no error in the charge of the court of which the defendant has reason to complain; that there was no infirmity in the note for want or failure of consideration; that the plaintiff could not have defended against the note on the ground that the defendant had promised not to call on him for payment until after his son had paid the plaintiff, because the note was conclusive as to the time when it fell due; that the plaintiff was not obliged to defend on the ground of avoiding circuity of action, because if he had succeded on the first note, he would still have had a cause of action for the price of the colt, and on the second, for the price of the colt and the amount paid on the first note; and that if the court should hold that there was no consideration for the note, then the plaintiff can recover on the common counts.

POLAND, Ch. J. The defendant's request to the court, and the charge thereon to which exception is taken, are based upon the assumption that the facts are all found by the jury, which the plaintiff's evidence tended to prove.

The defendant held two notes against his son, B. F. Rice, of about

$96., and his son was also indebted to Chester Baxter in the sum of $100., which the defendant for some reason desired to have paid and for which he was willing to advance the money, but was not willing to accept his son as debtor for the amount, believing or professing to believe that his son would be more likely to repay the amount to some other person than to him. The defendant therefore applied to the plaintiff, and requested him to take the two notes against his son, and one hundred dollars in money to pay to Baxter, and give his note to the defendant for the amount of both notes and money, deducting the sum of thirty dollars which the defendant owed the plaintiff for a colt. The plaintiff does not seem to have expected that he could in any way be the gainer by entering into such arrangement, and hesitated as to accepting the offer, fearing that he should lose the amount for which he thus made himself liable, but upon the defendant's repeated assurance that he would not and should not lose it, he finally consented to do as the plaintiff requested. Accordingly he took from the defendant the two notes against his son, and the hundred dollars to pay to Baxter, and gave his own note to the defendant for the amount, deducting thirty dollars due him from the defendant for the colt. The fair tendency and meaning of the plaintiff's testimony as to the transaction between the parties is, that the plaintiff really became the purchaser and owner of the two notes against the son, and also the creditor of the son for the hundred dollars paid to Baxter, and that these amounts when paid by the son, if paid at all, were to be paid to the plaintiff. In this view there was ample consideration for the note which the plaintiff executed to the defendant. It was a purchase of the son's two notes of the defendant, and a loan of money by the defendant to the plaintiff to pay or take up the son's note to Baxter. The plaintiff's evidence tended to prove that when the original note was given, and also when that was exchanged, and another given for the balance still unpaid, the defendant promised the plaintiff that he would not call on him for payment until he should have collected it out of the son. The parties seem to have treated the plaintiff's note to the defendant as a valid and real obligation against the plaintiff, as his own debt against the defendant was turned in to reduce it, and he made a payment upon it to the defendant before the first note was exchanged for the second. The reliance of

the plaintiff for his security and safety in the transaction was upon the defendant's assurance, that if he would comply with his request, and enter into the arrangement, which the defendant hoped would induce his son to make payment, he should not lose by it; in substance, a guaranty that the son should pay the claims that the plaintiff held against him, and also upon the defendant's assurance that he would not call for payment on the plaintiff's note until the plaintiff had collected the amount of the son. This agreement or promise of the defendant was upon ample consideration, as the plaintiff entered into the arrangement and gave his note at the request and for the sole benefit of the defendant. But before the plaintiff did or could collect anything of the son, the defendant transferred the plaintiff's note to Rogers, who called on the plaintiff for payment, and he did pay the amount without attempting to defend against it. The defendant's counsel claimed that if these facts were found, the note given by the plaintiff was without legal consideration, and that therefore when the plaintiff was called upon to pay it, he should have asserted his defence on that ground, and that not having done so, his payment was a voluntary one, and therefore he could maintain no action to recover back the amount so paid. The court told the jury that if the plaintiff made the payments voluntarily, without protest or objection, he could not recover them back in this suit, but that if the payments were made under protest and objection, and because payment was insisted on, and to avoid being sued, then he could recover. This is not the whole, but the substance of the charge.

The important enquiry is, whether the defendant was entitled to have the jury instructed that the plaintiff's evidence showed the plaintiff's note invalid for want of consideration, and that he might have successfully defended against it on that ground, so as to make it a case of voluntary payment of an unfounded claim in law. If the court below acceded to this view when they ought not to, and then allowed the plaintiff to avoid it, by proof of his making payment under protest, which would be no answer if the view were a sound one, it is no error for which the judgment should be reversed. It was only granting to the defendant more than he was entitled to, and putting the jury to find a fact proved by the plaintiff, which he was not bound to prove.

As already intimated, we think the note was not invalid for want of consideration; that the result of the arrangement was to make the plaintiff the real purchaser and owner of the debts against the son, and that the real claim of the plaintiff against the defendant was upon his assurance or guaranty that the the son should pay the amount of his liabilities to the plaintiff, and his agreement not to call for payment on the plaintiff's note until the son should make such payment. Instead of the plaintiff's evidence making a case of no consideration in the note, it was a case of an independent counter-claim on the part of the plaintiff against the defendant. Whether this could in any way have been successfully urged as a defence to the note, it is not necessary to determine; as a counter-claim, the plaintiff was not bound to set it up in defence or lose it.

The agreement not to call for payment on the note till the plaintiff should have collected the amount of the defendant's son, could not of course have been set up, because that would as a defence to the note, have been an attempt to vary the terms of the note by parol.

The note, when paid, did not represent the full amount of the plaintiff's claim; if entitled to recover at all, he was entitled to the thirty dollars originally deducted, which the defendant then owed to the plaintiff, and the fact that the note had been negotiated by the defendant to a third person, might have seriously interfered with the defence if attempted.

We are therefore of opinion that the plaintiff's evidence did not show a case of voluntary payment of a note legally invalid for want of consideration, and therefore that the defendant was not entitled to the instruction claimed of the court. We understand that where a party pays money which he is under no legal obligation to pay, with full knowledge of the facts, he cannot recover it back, and though legal proceedings are threatened, or even commenced, to enforce payment, if they are *bona fide*, and no undue advantage is taken of the situation of the defendant, and thereby the party is induced to make the payment, this does not prevent the payment from being in a legal sense voluntary. And where payment is thus voluntarily made, it amounts nothing to make it under protest or objection. But the case does not really reach this question.

If any question could have been made as to whether the case

proved was just that declared on; or whether parol evidence was admissible to prove the claim set up; or whether the undertaking of the defendant was not of a character required by the statute of frauds to be in writing in order to be legally enforceable; it is sufficient to say they were not made in the court below, and therefore cannot be made here. The county court correctly refused the instruction requested, and as we regard that as really the only essential point, and as substantial justice appears to have been done in the case, the judgment is affirmed.

DANIEL TOWN *v.* JONAS G. LAMPHIRE.

Rams. Fence. Evidence. Husband and Wife. Witness.

On an action to recover the penalty under the statute § 6, ch. 104, G. S., providing for the restraint of rams, evidence in respect to the character of the fence through which the ram escaped, or between the land where the ram was pastured and the land to which he escaped, is not admissible.

The owner or keeper of a ram is bound to restrain him at all events, during the season prescribed, and can not rely for a defence upon the promise of an adjoining owner to keep up a legal fence.

When two or more rams owned by different persons escape together, to the sheep of another, the owner of each is liable to a penalty for the escape of his own ram, and the payment by one of the penalty that he is subject to, for the escape of his ram, is no discharge of the liability of the others.

The plaintiff's wife was a competent witness in this case on the ground of being an agent for her husband.

THIS was an action on the case, brought to recover the penalty under the statute, § 6, ch. 104, G. S., providing for the restraint of rams. Plea, the general issue, with special notice of settlement of the matters embraced in the suit.

The plaintiff proved that in August, 1857, he had twelve sheep which were in his pasture, and that on the 27th day of the same August, he found the defendant's ram with his sheep in said pasture, and out of the enclosure where said ram belonged, and that he took up this ram, and also two other rams belonging to one Pitkin, which

had got out of the enclosure with the ram of the defendant, and which were also with his sheep.

The defendant proved that in the spring of 1857, he and one Pitkin, the owner of two rams, hired one Paschal P. Shattuck to pasture their rams after the first of August, on the account of the respective owners, and not on joint account.

The defendant also offered evidence, under the general issue, to prove that the fence between the plaintiff, Town, and Shattuck had been divided for many years, and each had kept up his own part; that in the spring of 1857, they also agreed to keep up their respective portions; that in the season of 1857, Shattuck told Town he was going to put rams into the pasture, and wanted he should see that his part of the fence was properly up and all right, and that he had fixed his part; that Town told him he would do so; that he had fixed it and it was all right, and that he would risk the rams getting out so far as his part of the fence was concerned; that he need not trouble himself about his part of the fence; that Shattuck afterwards spoke to him a second time, telling him he had put rams in there, and Town repeated the same assurance; that Shattuck went through and examined the fence and saw nothing but that it was safe and all right; that the rams in fact got out through Town's part of the fence, in consequence of his neglecting to put up and keep the fence as he had agreed; that Shattuck relied on Town's assurance in this respect.

The court ruled that the evidence, if admissible at all, was properly admissible under the general issue, but excluded it *pro forma* on the ground that it was incompetent as evidence in the case, and not proper evidence to be considered by the jury,—to which the defendant excepted.

There was also evidence in the case on the part of the defendant tending to prove that Pitkin, after the three rams had been taken up by the plaintiff, went to the plaintiff and settled for the penalty, and for the damage of all three of the rams, and paid therefor the sum of $5.50.

To contradict this testimony the plaintiff proposed to call his wife, Martha Town, as a witness, and as preliminary to doing so, he testified that a few days after Mr. Pitkin had taken away his rams, as already stated, he, the plaintiff, was going from home to be gone a

week; that on the morning of his leaving he told his wife that if Lamphire should come for his ram during his absence not to let him have it, unless he brought a writing from him (the plaintiff) that he had settled for it.

The plaintiff then offered his wife as a witness. The defendant objected to her being admitted. The objection was overruled, and she was admitted, to which the defendant excepted. She testified that the defendant came for the ram during said week of her husband's absence and took it away; that he broke open the stable where it was confined, without permission, and against her orders and efforts to prevent him from taking it away; also that she told him that her husband directed her not to let him have the ram till it was settled for.

It was proved that all three of the rams were taken up by the plaintiff at the same time, and from the same enclosure.

The defendant insisted, and requested the court to charge the jury:

That there can be but one penalty of $5. for any number of rams, escaping at the same time from the enclosure of the keeper to the enclosure of the owner of sheep.

That if one be the keeper of any number of rams, belonging to different owners, the person, into whose enclosure the rams escape, cannot sue each owner for a separate penalty for each ram. That he may recover one penalty, for the whole, from the keeper, or he may sue any one of the owners, and recover one penalty, and that will be a satisfaction for the whole.

That if the jury find in this case, that Pitkin settled for the *penalty* and paid $5., or more, the plaintiff cannot recover. That he can only recover in this case, by satisfying the jury that the settlement was not for the *penalty*, but was for the *forfeiture*, and only for Pitkin's two rams.

That if Mr. Shattuck was hired to keep or pasture Mr. Lamphire's ram, and the ram escaped from Shattuck's pasture into the enclosure of the plaintiff, without any fault on the part of Mr. Lamphire, the defendant, then this action cannot be maintained.

The court held, and charged the jury conformably to said requests, except in the following respect: The court charged, that if Shattuck was procured to pasture said rams for and on account of the respect-

ive owners thereof, and had them in his custody only in so pasturing them, he was not so the keeper as to preclude the plaintiff from recovering the penalty of the defendant as the owner; that if they found that said rams were so in the custody of said Shattuck when they escaped into the enclosure with the sheep of the plaintiff, the fact that Pitkin settled with the plaintiff in respect to his own rams would not constitute a defence in this suit unless the jury should find that, *in point of fact*, that settlement by Pitkin with the plaintiff embraced the defendant's ram as well as Pitkin's.

To the refusal of the court to charge as requested, and to the part of the charge above stated, the defendant excepted. Verdict for the plaintiff.

Washburn & Marsh, for the defendant, cited upon the point that the defendant's evidence, which was excluded, should have been received, *Hicks et al.* v. *Cram et al.*, 17 Vt. 455; *Strong* v. *Ellsworth*, 26 Vt. 373; *Cummings* v. *Webster*, 43 Maine, 194.

Gilbert A. Davis and *Converse & French*, for the plaintiff, cited upon the negative of the same point, *Brinsmaid, Adm'r*, v. *Mayo*, 9 Vt. 31; *Isaacs* v. *Clark*, 12 Vt. 692; *Howard* v. *Mitchell*, 14 Mass. 241.

PIERPOINT, J. We think the testimony offered by the defendant as to what passed between the plaintiff and Shattuck as to the division fence between them, was properly rejected. It was decided in this case at the last term of the supreme court in this county, that it was the duty of the defendant to restrain his ram from running at large, irrespective of any obligation on the plaintiff's part to keep up a legal fence between him and Shattuck, in whose enclosure the defendant was having his ram kept, and it was then held that the defendant had incurred the penalty, if his ram was found off his enclosure and with the sheep of the plaintiff, unless it was made to appear that the ram was so off the defendant's premises by reason of some positive wrongful act of the plaintiff himself, or could not have been prevented by the utmost care and diligence of the defendant, or Shattuck the keeper.

The only respect in which the testimony offered differs materially, from what was in the case when it was before us last year, is that the plaintiff told Shattuck, that he would see that his part of the fence

was properly up, and that he would risk the ram's getting out, so far as his part of the fence was concerned.

This did not constitute any agreement on the part of the plaintiff that placed him under any additional obligation. He was bound by law to keep up a legal fence. What he said to Shattuck, if it had been based on any legal consideration, would not have increased his duty to keep up his fence. His saying that he would risk the ram's getting out, was but another way of saying he would keep up his fence. The fact that Shattuck relied on his keeping the fence up, does not change the case. Shattuck had no right to rely on any such agreement, or obligation, whether imposed by law or by his promise. The law required him to restrain the animal at all events, as already decided; and he seems to have so regarded it, for he went through and examined the plaintiff's fence and found it all right. It does not appear from the case that Shattuck did any act, or neglected to do any act, relying on what the plaintiff said, that he would not have done, or neglected, if the plaintiff had not said anything on the subject, so that the doctrine of estoppel has no application to the case.

It is insisted that the settlement with Pitkin operated to discharge the defendant, and that but one penalty was incurred for the escape of all the sheep. It may be true that so far as Shattuck, the keeper, is concerned, but one penalty was incurred; he was only the keeper of them all; they were kept together and so far as appears escaped together, but it is not necessary now to determine this question.

The statute imposes the penalty upon the owner of any ram, or rams, that shall be found out of the enclosure of such owner or the keeper, and with the sheep of another, between certain periods. In this case the defendant's ram was found out of the enclosure of the owner, and keeper, and with the sheep of the plaintiff; this subjects the owner to the penalty, and it clearly can make no difference with the defendant's liability, that his ram escaped and was found with the rams of another. In such case the owner of each is liable to a penalty for the escape of his own ram, and the payment by one of the penalty that he is subject to, for the escape of his ram, is no discharge of the liability of the other.

It is further insisted that the county court erred in admitting the testimony of the wife of the plaintiff, as to what transpired between

her and the defendant, at the time when the defendant took the ram from the plaintiff's barn.

The statute provides that the wife may be a witness for or against her husband "in all matters of business transactions, where the transaction was had and conducted by the wife as the agent of her husband."

It appears that when the plaintiff left his home to be absent a few days, he expressly directed his wife not to let the defendant take his ram away, unless he brought a writing from the plaintiff that he had settled for it. During the absence of the plaintiff the defendant went to the plaintiff's house to get the ram; the wife told the defendant what directions she had from her husband, and forbid his taking the animal away, but the defendant broke into the stable and took him. It was in relation to this transaction only that the wife testified.

She was clearly the agent of the plaintiff in this matter, and testified simply as to what took place in connection with the discharge of her duties, under such express directions of her husband, and for this purpose we think she was a competent witness.

Judgment affirmed.

The State of Vermont v. Asa T. Barron.

Intoxicating Liquor. Evidence. Criminal Law.

In a prosecution for furnishing intoxicating liquors contrary to law, the government had proved by several witnesses that they had drank liquor in rooms in the respondent's public house on public occasions, when asked to do so by parties occupying such rooms, but did not know where the liquor came from. *Held*, that evidence on the part of the respondent to show the habit of gentlemen, in travelling about the country, to carry spirituous liquors in bottles with them, was inadmissible.

It is competent to prove by an officer who was furnished with a subpœna to serve on government witnesses, that they were sent away so he could not summon them; but his testimony that he heard that they were away, and did not look for them, but understood they had been gone a short time, would not be admissible.

It seems, that the rule is well settled in this state that in criminal cases the jury are the judges of the law.

State *v.* Barron.

Whether *ale* is intoxicating or not, is not a question of law, but of fact, and the question may be submitted to the jury without evidence to show that it is intoxicating.

Where liquor is furnished in answer to a single call, at the same time, and by a single act, it can constitute but one act of furnishing, and the party incurs but one penalty, notwithstanding it may be drank by more than one person. But where the liquor is furnished either on a single call, or more, if it be done at different times and by separate acts, no matter how closely these several acts may follow each other in point of time, each act of furnishing constitutes a separate offence, and subjects the party to a separate penalty, whether the liquor be all drank by the same person or by different persons.

THIS was a prosecution by indictment for selling and furnishing intoxicating liquors contrary to law. Plea, not guilty. Trial by jury, May Term, 1863, BARRETT, J., presiding.

The government gave evidence tending to show, that the respondent is the keeper of a public house at White River Junction, in Hartford, in said county, called the "Junction House," and that in said house there is a room, adjoining the bar room, called by the witnesses the cloak room, and that in a cupboard in this room bottles containing spirituous liquors were kept, with glasses, &c.

The government introduced several witnesses who testified in substance, that they had drank liquor in said room in company with and upon the invitation of others, but they did not know who paid for the liquor, or whether it was paid for, and did not know who waited upon them. Some of the government witnesses also testified that they had been asked to drink by gentlemen in their rooms in the respondent's house, and had drank liquor in their rooms, but did not know who provided the liquor. None testified to any instance of sale or furnishing of liquor to the persons who drank, by the respondent in person. One witness testified that he had drank ale in said house.

The respondent offered on cross examination of witnesses introduced by the government, to ask if it was not the habit of gentlemen in traveling about the country, to carry spirituous liquors in bottles with them. This was objected to by the prosecution, and excluded by the court, to which the respondent excepted.

The government called Jasper Hazen, the officer who served the subpœna on the government witnesses in this case, and stated that they expected to prove by him that two of the respondent's clerks,

Andrews and Tinkham, whose names were in said subpœna, to be summoned by him, had been got out of the way so that he could not summon them. To this the respondent objected, but the court overruled the objection and permitted the witness to testify, to which the respondent excepted. The witness testified that he heard that Andrews and Tinkham were not at the Junction, and he did not look for them; that he understood that they had gone to Boston—did not learn how long they had been gone—understood a short time. To this testimony as given the respondent excepted.

The respondent requested the court to charge the jury, 1st—That the respondent could not be found guilty under this indictment unless the jury found that he either sold or furnished the intoxicating liquors himself, or that the same was sold or furnished by some clerk, servant, or agent of his. 2d—That the respondent could not be found guilty under this indictment for selling or furnishing *ale*, as the same is not "intoxicating liquor" within the meaning and intention of the law. 3d—That in the cases where two or more persons drank together, one of them calling for the liquor and asking the others to drink with him, that this constituted but one act of selling or furnishing, and but one offence.

The court declined to charge the jury as requested in the second and third requests.

As to the second request, the court told the jury that the jury in criminal cases are judges of the law as well as of the facts, and would leave it for them to say, whether *ale* is intoxicating liquor or not, within the prohibition of the statute.

The jury on returning their verdict stated that they found four offences for furnishing *ale*.

The charge of the court as to the third request, is fully stated in the opinion.

To the charge on the subject of the second and third requests the respondent excepted.

The jury returned a verdict of guilty of thirty-six offences.

Converse & French, for the respondent, maintained in respect to the third request, that the charge of the court was entirely erroneous as to the number of offences for which the respondent could be convicted.

The law imposes a penalty against any person who "*shall sell, furnish, or give away any intoxicating liquor in violation of this act.*" Sec. 5. By Sec. 18, "*every distinct act of selling, furnishing or giving away may be proved, and the court shall impose a fine for each offence.*" Acts of 1852, p. 19.

What is a "*distinct act of selling, &c.?*" What is "*each offence?*" Does not the dealer sell it to the person who *calls for it?* Is not the *offence* spoken of in the statute in furnishing it to each person? The person calling for the liquor *pays for it*, and the transaction is wholly *between him and the dealer.* The person calling for the liquor may do what he pleases with it; he can treat a friend with it, and *it is he who furnishes it to the third person; not* the dealer.

Charles P. Marsh, State's Attorney, for the prosecution, maintained as to the third request, that: If Barron was the owner of the liquor when it was poured from the bottles, then most certainly each distinct act of pouring into a separate vessel or glass for sale or furnishing, was a distinct offence against the law.

Who is guilty of the several furnishings or sales when ten men come up to his counter or cup-board and drink, if not the respondent? Who else furnishes the liquor. Who else receives the pay? And does it make any difference in the eye of the law or in Barron's profits whether one man calls for ten glasses of rum for ten different people and pays for the ten, or whether each of the ten calls for the liquor at the same time, and each man pays for his glass? *Barron or his clerk makes the delivery in each and all of the cases; and on Barron's premises.*

Pierpoint, J. The first question presented by the exceptions, is as to the admissibility of the evidence offered by the respondent to show "the habit of gentlemen in traveling about the country to carry spirituous liquors in bottles with them." The government had proved by several witnesses that they had drank liquor in rooms in the respondent's house, on public occasions, when asked to do so by parties occupying such rooms, but did not know where the liquor came from. It was to meet this class of testimony that the offer was made. The court rejected the testimony, and we think properly. Such evidence would be quite too remote and indefinite to warrant a

jury in drawing any inference therefrom, as to the source from which the liquor came that they drank upon the occasions referred to. If the offer had been to show that the guests who visited *this house* were in the habit of bringing their liquor with them, and furnishing it to their friends in their rooms, it might have been admissible as tending to show the source from which the liquor came, that the witnesses drank, and as rebutting the inference that would otherwise arise, that it was obtained in the house, of the proprietor; but the simple fact that travelers are in the habit of carrying liquor with them, has not, legitimately, any such tendency.

The second question, is as to the admissibility of the testimony of Jasper Hazen, the officer who subpœnaed the government witnesses. What the prosecution offered to prove by this witness was clearly admissible as tending to show that the respondent had been instrumental in causing his two clerks to be absent, so that they could not be used as witnesses against him. If any one had "got them out of the way," the inference would have been that it was done through the respondent's agency, as no other person would have had any interest in producing such a result. But the testimony given by Hazen did not come up to the offer, and was not admissible. He states no fact of his own knowledge. He simply states "that he heard that the clerks were not at the Junction, and he did not look for them; that he understood they had gone to Boston." After the testimony was given it was again objected to, but was not excluded. We think the court should have told the jury that this evidence must be laid entirely out of the case as being inadmissible and incompetent to establish any fact against the respondent; but being received and the jury allowed to consider it, it was well calculated to create a prejudice against him, and might have contributed materially to the result. In this we think there was error.

In the third place it is insisted that the court erred in submitting the question to the jury whether or not ale is intoxicating. It is claimed that this is a question of law and should have been decided by the court, and a labored and learned argument has been made to satisfy us that the jury are not judges of the law in criminal cases. We think the rule is now well settled in this state that in criminal cases the jury are the judges of the law. It is the duty of the court

however to instruct the jury as to the law applicable to the case on trial, and if the jury disregard the instructions or mistake the law, and render a verdict that is clearly in violation of law, the court may for that reason set aside the verdict, if the respondent is convicted. With these restrictions upon the power of the jury, the evils that are apprehended as the result of the rule, will be found to exist we think only in the imagination; but this question does not arise in the case. Whether ale is intoxicating or not, is not a question of law, but of fact, and is peculiarly within the province of the jury.

But it is said, if it be regarded as a question of fact, then the court erred in submitting it to the jury, as there was no evidence to show that ale is intoxicating.

There is a class of liquors or liquids that are universally conceded and known to be intoxicating. Some contain a greater proportion of the intoxicating properties than others. Wine is less intoxicating than brandy, yet one is as universally acknowledged to be an intoxicating liquor as the other. So with ale; everybody understands that it is intoxicating, and that it comes within the provisions of the statute that prohibits the sale of all intoxicating liquor. When the government in a prosecution for the violation of the statute, proves the respondent guilty of selling or furnishing any of this class of liquors contrary to the statute, that is sufficient to warrant the jury in finding him guilty of selling or furnishing *intoxicating* liquor. There is no more occasion for requiring affirmative proof that ale is intoxicating, than that brandy is intoxicating, or that gunpowder is explosive. The jury are at liberty to act upon the knowledge they possess upon the subject in common with all the rest of mankind. It is possible that ale may be manufactured with so small a proportion of the intoxicating properties, as not to come within the class that are denominated intoxicating liquors. If so it must form an exception to the general rule, and if a respondent would avail himself of such a fact, it is incumbent upon him to prove it.

It is further insisted that the county court erred in their construction of the statute as to what constitutes a distinct offence under it, subjecting the offender to the penalty. The court told the jury "that

in case of one or more persons drinking intoxicating liquor, furnished or sold by the respondent, upon the invitation and call of another, the furnishing or selling what was drank by each person would constitute a distinct offence, when no definite portion, as a bottle, or pint or quart, or other definite portion of the liquor was set apart and appropriated to and became the property of the person calling for it, and when upon the call a bottle or bottles containing the desired liquor was set down and each poured out what he saw fit, leaving the remainder the property of the respondent."

The jury by their verdict found the respondent guilty of thirty-six acts of furnishing, and no acts of selling, so that the question here is what constitutes a distinct act of furnishing.

The statute provides that if any person, &c., shall sell, furnish or give away any intoxicating liquor, &c., he shall forfeit and pay for *each offence* the sum of ten dollars.

We think the county court in the charge to the jury laid down a rule broader than the statute will warrant; the extent of the forfeiture incurred by the respondent is made to depend not upon an act of his, in furnishing liquor, but upon the act of the person to whom it has been furnished after it has been placed at his disposal. When liquor is called for and furnished by the person on whom the call is made, the act of furnishing is complete, and the penalty is incurred, and it does not constitute a new and independent act of furnishing on the part of the person furnishing it, if the person to whom it is furnished allows another to partake of it with him. That depends upon his will, and is an act for which he is responsible, and not the person who supplies the liquor. Where liquor is furnished in answer to a single call, at the same time, and by a single act, it can constitute but one act of furnishing, and the party incurs but one penalty, notwithstanding it may be drank by more than one person. But where the liquor is furnished either on a single call, or more, if it be done at different times and by separate acts, no matter how closely these several acts may follow each other in point of time, each act of furnishing constitutes a separate offence, and subjects the party to a separate penalty, whether the liquor be all drank by the same person or by different persons.

Under the charge of the court it is possible the jury may have found the respondent guilty of several acts of furnishing, when under the construction which we put upon the law there was in fact but one.

A new trial is granted

TENNEY, BALLISTER & CO. *v.* NEW ENGLAND PROTECTIVE UNION, DIVISION No. 172.

Partnership.

P. was one of the originators, and had for several years been an active member, and one of the directors, of a mercantile association, called the N. E. Protective Union, Div. 172. Finally he moved away and ceased to do any business with the association, and supposed he had ceased to be a member of it, but notified no one of his purpose to withdraw. *Held*, that as between himself and the other members he had not ceased to be a member of the division.

But if he had, still if he was a member when the dealings between the plaintiffs and the division began, and the plaintiffs knew it, they were entitled to treat him as a member until they were notified that he had withdrawn.

The death of a member would not work a dissolution of the association, as it was designed in its organization to have perpetuity.

ASSUMPSIT on four promissory notes, and for goods sold. One of the defendants pleaded in abatement, to which the plaintiffs replied. All the other defendants upon whom service was made pleaded non assumpsit.

Trial by the court, by consent of parties, December Term, 1863, BARRETT, J., presiding.

It was proved that in 1850 the defendants formed an association under the style of the New England Protective Union, Division No. 172, for the purpose of doing ordinary mercantile business, in the village of South Londonderry, and adopted a constitution and by-laws, and did business down to about the 1st of February, 1861, at which time said company failed, and all the property belonging to it was attached by its creditors, whereupon the business ceased and has not been resumed.

Winfield Wright, one of the defendants, was appointed agent of the company in May, 1857, whose business as such agent was to take charge of the store and do the buying and selling of the goods, and make and receive payment therefor, and he continued to be such agent and do the business thereof down to the time of said failure. From 1858 to the time said notes were given, the company purchased the goods for which the notes were given, by said agent, of the plaintiffs, and one bill of goods after that, viz.: on the 30th day of January, 1861, amounting to $92.54.

Sem Pierce, one of the defendants named in the plea in abatement, resided at the time the association was formed in Londonderry, and continued to reside there till July, 1859, when he removed to Plymouth, and resided there at the time this suit was brought.

Pierce was one of the original members of the association, and took an active part in its formation and organization. He paid in the ten dollars provided by the amendment of the 14th article of the by-laws, made the 14th of August, 1852. As a member of the association and as director he participated in its business, and continued to purchase goods at the store down to the time of his removal to Plymouth, but not afterwards. For goods purchased by him a balance of account had accrued against him of some over $30., in May, 1859. About this time he paid $13. on his account. After he had sold his farm, in 1859, he told Howard, one of the directors, that he had sold his farm and was going out of town; that he supposed he was owing the concern some $30. or more, and that he could pay that up into about $10. A day or two before he removed, as he was passing the store he called the agent Wright to the door, and handed him $10., saying that just about squared him out. Pierce's understanding was, that under the 14th article of the by-laws, and the amendment, he was entitled to goods to the amount of his subscription any time on demand, and if he left and did not take the goods they would balance an equal amount of what he was owing. He never settled his account with the company, and it stands now just as he left it upon the payment of the $13. and $10., which were credited to him on his account on the books of the company. He never said anything to the agent about withdrawing from the association, nor did he ever publish, or give to the plaintiffs any notice, nor

had they any notice, of his withdrawing from the company. He supposed, himself, that he was out of the concern.

The business of the association was under the control and supervision of the directors, and so continued to be down to the time it ceased. There was never any published dissolution of the association, nor any action taken by it for the purpose of dissolving it.

Russell Aldrich, a member of the association, died October 18th, 1860. The court found from the constitution, by-laws, records, &c., that the association was designed to be continuing and to have perpetuity, and not to be dissolved, or its continued existence as a partnership to be affected by the death or withdrawal of any member. It was argued and claimed on both sides that said association was a copartnership. The plaintiffs gave in evidence the notes described in the declaration. No question was made as to their due execution, or as to the authority of Wright to give them, as agent of the association, or as to their validity as binding the association.

The defendants claimed: 1st, That by reason of Pierce leaving Londonderry and removing to Plymouth, he ceased to be a member of the company, and so was improperly made a defendant in this suit. 2d, That by the decease of Aldrich the partnership became dissolved, and that as Pierce had nothing to do with the matter at and after that time, he could not be held as partner after that time, and so was improperly made a defendant in this suit. Upon the facts detailed the court declined to sustain either proposition, and found the issue under the plea in abatement, and under the plea of non assumpsit, for the plaintiffs, and rendered judgment for the sum due on the notes, and on said account of January 30th, 1861,—to which the defendants excepted.

Washburn & Marsh and *Butler & Wheeler*, for the defendants.

Luther Adams, for the plaintiffs.

KELLOGG, J. No copy of the plea in abatement, or of the defendants' constitution, by-laws, and records, having been furnished to us, we must assume that, in the judgment of counsel, the references to these papers in the briefs are sufficient for the purposes of the hearing in this court. We are informed by the briefs that the plea in abatement and the defence to the action both rest on the alleged

fact that the defendant Pierce had ceased to be a member of the partnership of the defendants before the debts which are the subject of the suit were contracted.

From the facts found by the county court, it appears that these debts were contracted between May, 1858, and February, 1861, and that Pierce was one of the original members of the partnership, or division, at the time of its organization in 1850, and, from that time up to the time of his removal from Londonderry to Plymouth in July, 1859, he appears to have been an active director and leading manager of the division. The defendants' division or partnership commenced making purchases of goods from the plaintiffs as early as May, 1858, —a year or more previous to the time when, as is claimed, Pierce ceased to be a member of the division. The natural presumption arising from the fact that the plaintiffs gave credit to the division is that the credit was given in reliance upon the liability of the members of the division at that time, and that the plaintiffs knew who were the members of the division to which they were giving credit. Nothing appears in the case tending to establish a contrary conclusion.

Did Pierce cease to be a member of the division as between himself and the other members? His removal from the town could not affect the question, unless there was some provision in the constitution or by-laws of the division which made residence in the town a condition of membership. It is not claimed that there was any such provision in this case. Neither would his supposition that he had ceased to be a member of the division affect the question, unless there was some act on his part which justified that supposition. It distinctly appears that he did not at any time say any thing to the agent of the division about withdrawing from it; and it does not appear that he gave any information to any other officer or member of the division of his purpose or desire to withdraw from it. We find no ground on which it can be claimed that, as between himself and the other members, he ceased to be a member of the division. It is clear that he did not relieve himself from liability by ceasing to participate in the management of its business.

But even if, as between him and the other members, he had ceased to be a member of the division, still, as he was a member when the

dealings between the plaintiffs and the division began, the plaintiffs were entitled to treat him as a member until they were notified that he had withdrawn from the division, unless it appeared that, when they gave credit to the division, they did not know that he was a member of it. No such notice is claimed to have been given by Pierce to the plaintiffs. His liability to the plaintiffs would continue the same as that of any other member of the division until this notice was given. This is a settled principle of the law of partnership.

It is claimed that the defendants' partnership was dissolved in October, 1860, by the death of Russell Aldrich, one of its members, and that the surviving members cannot be held responsible for the dealings had with the plaintiffs after that time without their assent or knowledge, although had in the name of the division and by its managing agent, and in the same way that the previous dealings had been had. It is not necessary to pass upon the question whether this division or association was in strictness a partnership or not, inasmuch as both parties claimed that it was a partnership. It was found by the county court that the association was designed to be continuing and to have perpetuity, and not to be dissolved, or its continued existence as a partnership to be affected by the death or withdrawal of any member. The death of Aldrich would not, therefore, work a dissolution of the partnership any more than would the withdrawal of any other member from it. Neither the death nor the withdrawal of a member would affect the liability of those who continued to be members for debts contracted in the name and for the benefit of the association.

We find no ground for the conclusion that Pierce was improperly made a defendant in this suit; and the judgment of the county court in favor of the plaintiffs is accordingly affirmed.

JAMES DAVIS, *Administrator of* JOHN MARSHALL, v. ALBA MARSHALL.

Statute of Limitations. Construction.

Under the second clause of § 15, ch. 63, G. S., the time of the debtors *residence* out of the State, is deducted in computing the period of the statute of limitations, although he was absent from and resided out of the State when the cause of action accrued.

Construction given to § 15, ch. 63, G. S.

ASSUMPSIT on a promissory note executed to the plaintiff's intestate by the defendant, at Troy, in the State of New York, for seven hundred dollars, dated September 30th, 1850, and payable one day after date, with interest annually.

Plea, the general issue and the statute of limitations.

Replication, that at the time the cause of action accrued the defendant resided out of the state, and has continued to reside out of the state to the present time, and has not been in this state except several times for transient and temporary purposes, remaining but a very short time on each occasion, and in all less than six years, to wit., six weeks, and that the intestate resided in this state till his death, and the plaintiff has so resided since his appointment, and that the defendant has had no known property within this state which could be attached.

Rejoinder, that though the defendant resided continuously out of the state, yet during all the time after the cause of action accrued he came into the state each year and remained a few days at each time, but not in all amounting to six years, and that this was known to the said John Marshall and to the plaintiff,—to which rejoinder the plaintiff demurred.

The court at the December Term, 1863, BARRETT, J., presiding, rendered judgment *pro forma* that the rejoinder is sufficient, and that the defendant recover his costs. Exceptions by the plaintiff.

A. P. Hunton, for the plaintiff.

1st. The defendant did not so come into the state that the statute commenced to run. *Russ* v. *Fay*, 29 Vt. 381.

2d. If he did so he was not here six years. *Hall* v. *Nasmith*, 28 Vt. 791.

D. C. Denison, for the defendant.

The two clauses of the statute are separate, distinct and independent.

This case comes under the first clause, and the statute having begun to run on the defendant's coming into the state, there is no provision for future absences interrupting it. *Mazozon et al.* v. *Foot*, 1 Aik. 282; *Hill* v. *Bellows*, 15 Vt. 727.

In *Russ* v. *Fay*, 29 Vt. 381, a case arising under the first clause, the court lost sight of the distinction between the two clauses, and decided it upon a principle applicable only to the second, viz., that the defendant had property liable to attachment within this state.

PECK, J. The question presented and discussed arises upon the construction of § 15, p. 443, G. S., on the subject of limitation of actions. That section, so far as the question arising upon the pleadings is concerned, is the same as § 14, C. S., p. 379, and § 14, p. 306, R. S., and which has been in force ever since 1839. The defendant claims that the first provision in that section applies exclusively to cases where the debtor is out of the state at the time the cause of action accrues; and that the subsequent part of the section providing for deducting the time of the debtor's absence from the state in computing the period of the statute of limitations, applies exclusively to cases where the debtor is in the state when the right of action accrues, and leaves the state afterwards before the statute has run; and hence that the provision that "the time of his absence shall not be computed as any part of the time limited," is not applicable to this case. The part on which defendant relies is as follows: "If at the time when any cause of action of a personal nature mentioned in this chapter shall accrue against any person, he shall be out of the state, the action may be commenced within the time herein limited therefor, after such person shall come into the state." If this were the only and the whole provision on the subject of absent debtors, then, as the defendant claims, the coming into the state with the knowledge of the creditor as alleged, would put the statute in operation, and the subsequent absence of the debtor from the state would not arrest it; because the provision thus far is substantially that contained in sec. 10 of the act of 1797, (except the clause in the act of 1797 as to the debtor not having known property in the state,) and

such was the construction of that provision in the act of 1797. Slade's St., p. 291, § 10. Such was also the construction of the St. 4 and 5 Ann. c. 16, from which the provision in the act of 1797 was substantially copied, and the construction of statutes in other states copied from that English statute. *Mazozon & Sperry* v. *Foote*, 1 Aik. 282.

The residue of the section in question, being the part mainly relied on by the plaintiff, is, "and if after any cause of action shall have accrued, and before the statute shall have run, the person against whom it shall have accrued shall be absent from and reside out of the state, and shall not have known property within the state, &c., the time of his absence shall not be taken as any part of the time limited for the commencement of the action." This provision in that section extends to the whole period during which the statute can ever run under any circumstances, that is, to the whole time after the cause of action accrues. The statute never begins to run till after the cause of action accrues; and this provision deducts all the time the debtor shall be absent from and reside out of the state after any cause of action shall have accrued. This language is broad enough to include this case, notwithstanding the debtor was, and resided, out of the state before and when the cause of action accrued. There are are no words in this provision limiting it to cases where the debtor resides in the state when the cause of action accrues. It does not say, if a debtor shall be or reside in the state when the cause of action accrues, and shall afterwards be absent and reside out of the state before the statute shall have run; nor does it say, if the debtor *shall go* out of the state. The language is, *shall be absent from and reside out of the state* before the statute shall have run. The debtor in this case has none the less been *absent from and resided out of the state after the cause of action accrued*, because he was absent before also. If this were the whole and only provision relating to absent debtors, there can be no doubt but that the language would embrace the case under consideration, and that it should be so interpreted. The fair and legitimate construction of the language would be, that the absence after the cause of action accrued should be deducted without reference to the fact that the debtor was absent also when the cause of action accrued.

But the whole section must be construed together, and the question is, what the true construction is, taking both these provisions which make up the section. It may be asked, as the legislature in terms limited the first branch of the section to cases of absence existing at the time the cause of action accrued, why they did not, if they so intended, use words limiting the subsequent branch of it to cases where the debtor was in the state when the cause of action accrued.

Previous to the act of 1832, whenever the statute of limitations once commenced to run, it continued to run notwithstanding the debtor's absence from the state without known property in the state. A debtor out of the state when the cause of action accrued might put the statute in operation by coming into the state with the knowledge of the creditor, although he left the state the next day. A debtor residing here might have left the state the next day after the cause of action accrued. In either case the creditor might be barred, although he had had an opportunity but for a single day to commence suit in this state. To remedy this mischief the act of 1832 was passed. Comp. St. (1834) p. 57. The statute was remedial and ought to be liberally expounded. The construction ought to be such as will make the remedy co-extensive with the mischief, if the language will warrant it. The hardship and injustice to the creditor was the same in a case where the debtor resided out of the state when the cause of action accrued, and set the statute in operation by coming and remaining in the state a day, as where the debtor resided here when the cause of action accrued, and left the state a day after. There is no stronger reason for a remedy in the one case than in the other. The case at bar is within the letter of that act. Until the debtor came into the state and set the statute in operation, it was prevented from operating by the 10th section of the act of 1797; and when the defendant left the state after coming in, he did "*go from this state,*" in the very language of the act of 1832. So that if the act of 1832 is construed to apply only to cases where the debtor shall go from this state after the statute has begun to run, and before the cause of action is barred, this case comes within the language as well as the reason of that act. In the Revision of 1839, the 14th section is made up of the act of 1832 and section 10 of the act of 1797, with a little change in the phraseology. The words

"*shall go from this state*," are dropped, and the words, "*shall be absent from and reside out of the state*," substituted. This language as clearly embraces one who is absent when the right of action accrues, as do the words of the act of 1832. Indeed there is more reason to suppose this change of phrascology was to avoid the danger of the construction the defendant contends for, than to suppose it was intended to exclude cases where the debtor was, and resided, out of the state when the cause of action accrued.

But if we give to the first provision of the section in question the same construction that was given to section 10 of the act of 1797, as the defendant claims, still the demand in this case is saved from the operation of the statute. The first provision of the section uses the words, "*shall be* out of the state," and would embrace a case where the debtor was out of the state when the right of action accrued, although he at the same time resided in the state. But the next provision would not embrace such a case, because the language is, "shall be absent from *and reside* out of the state." *Hackett* v. *Kendall*, 23 Vt. 275. So that upon this construction, if the defendant had resided in this state and been in the state temporarily as the pleadings show, the statute would have continued to run from the time he first came into the state to the knowledge of the plaintiff, after the right of action accrued, and the debtor's subsequent absence could not be deducted, as the provision for that purpose does not apply to a debtor who is absent from the state, but residing in the state so that a writ might be served on him by leaving a copy at his usual abode in this state. But as the defendant resided out of the state, he comes within the provision for deducting such absence in computing the period of the statute of limitations. This construction gives effect to both branches of the section of the statute, and applies each to a distinct class of cases. In this view the two provisions are not in conflict. There is no incongruity in saying that, when a debtor is out of the state when the cause of action accrues, the action may be commenced within the time limited by the statute after he comes into the state; but whenever a debtor is not only absent from but also *resides* out of the state, the time of such absence shall not be taken as any part of the time limited for the commencement of the action.

As the defendant's absence was coupled with a residence out of

the state, it comes within the provision for deducting the time of his absence from the state, in computing the period of the statute of limitations, and the fact that he was absent from and resided out of the state when the right of action accrued, does not take it out of that provision.

Judgment reversed and judgment that the defendant's rejoinder is insufficient, and case remanded for trial on the issue of fact joined upon the general issue.

TOWN OF SHARON *v.* TOWN OF STRAFFORD.

Removal of Paupers. Pleading. Abatement. Amendment.

The certificate of the justices upon the copy of an order of removal of a pauper to be served upon the overseer of the poor of the town to which the pauper is ordered to be removed, is an indispensable requisite, and a constituent part of the process to be served, and without it the statute, § 11, ch. 20, G. S., is not complied with.

If wanting, the defect cannot be cured by amendment.

THIS was an appeal from an order of removal of a pauper from Sharon to Strafford. The latter town filed a plea in abatement on the ground that the copy of the order given to the officer to serve on the overseer of the latter town, had no certificate of the justices upon it, other than their signature to the order, that is, to the copy of the order, and that the copy left with the overseer of Strafford contained no copy of any such certificate. Whereupon the town of Sharon filed a motion for leave to amend.

The court at the December Term, 1863, BARRETT, J., presiding, *pro forma* overruled the motion, and rendered judgment on the plea that the order of removal be quashed,—to which the town of Sharon excepted.

Converse & French, for the plaintiff.

We insist that when the justices made out a copy of their order of removal *and signed the same at the bottom it was a certifying within the meaning and intention of the law.* It is a *certificate by them signed*

that they have made the order of removal as therein stated. What object can there be for them to sign it twice? The case is entirely different from that of an *officer serving process;* then *he* signs the name at the bottom of the copy, and then "*attests*" that it is a true copy. Statutes are to be construed according to the *intention of the legislature.* It could not have been the intention that there should be a separate certifying. *Ryegate* v. *Wardsboro*, 30 Vt. 746; *Catlin* v. *Hull*, 21 *ib.* 152; *Dutton* v. *Vt. Mut. F. Ins. Co.*, 17 *ib.* 369; *Henry* v. *Tilson*, 17 *ib.* 479. The statute is but *directory*, and the omission of it cannot vitiate the proceedings.

II. The court erred in deciding that they had no power to allow the amendment. This is a general power incident to all courts in any proceedings which may be pending in court. The fact that it strikes back to the order of removal by the justices does not change it, as was held in *Barnet* v. *Concord*, 4 Vt. 564, 571.

Peck & Colby, for the defendant.

The amendment asked for should not be granted. The amendment of writs and other process furnishes no analogy. This is a statutory proceeding and a strict compliance with the provisions of the statute has always been required. *Barnet* v. *Concord*, 4 Vt. 564; *Georgia* v. *St. Albans*, 3 Vt. 42; *Wheelock* v. *Lyndon*, 6 Vt. 524.

PECK, J. The notice to the town of Strafford of the order of removal, was given by a service made by an officer under the provision of the statute authorizing service as a writ of summons is by law required to be served. It appears that the copy of the order which was given to the officer to serve had no certificate of the justices upon it, other than their signature to the order, that is, to the copy of the order, and that the copy left with the overseer of Strafford contained no copy of any such certificate. The officer regularly served such paper as the justices furnished him. The plea in abatement presents the question whether such a service was a compliance with the statute, the paper and service being otherwise regular; and if not, whether it was amendable. The county court refused to grant a motion to amend, on the ground that it was not amendable, and quashed the order.

1. The plaintiff claims that a copy of the order signed by the justices is all that the statute requires; that is, that their names be-

ing subscribed to the copy of the order, it was a certifying of the copy within the meaning of the statute. The language of the statute is that the justices "*shall make and certify a copy of the order of removal*," &c. A copy of the order, to be complete, must contain the signature of the justices; hence it is evident that the legislature intended by the words, "*and* certify," that the justices should do something more than to make a complete copy. It is evident that the intention was that it should be certified by a certificate upon it, signed by the justices, to the effect that it was a true copy. The word *certify* is to be taken in the statute in the common acceptation of the term as applied to official proceedings. The object of the statute is that the adverse town shall not only be notified that an order of removal has been made, but that it shall be informed what the order is, in such a manner that it shall be able to judge whether to appeal, or to submit to the order and take charge of the pauper. For this purpose the overseer is by the statute entitled, not only to a copy of the order, but to a copy that the justices say over their official signatures, is a true copy. It is true the notice appended, signed by the justices, states that they made an order, but it does not state, and is not required to state, that the foregoing is a copy of it. The office and purpose of the certificate is to show that.

Previous to the act of 1850, authorizing notice by service by an officer, the provision for notice was that "a true copy of such order, certified by the justices making the same," shall be left, &c. Under that statute any private person might leave the copy with the overseer, and the only evidence the overseer had that it was a copy, was the certificate of the justices. The practice, so far as I am informed, under that statute, was to annex such certificate to the order. The act of 1850, containing substantially the same language, shows that it was not the intention to dispense with such certificate.

The certificate is an indispensable requisite, and a constituent part of the process to be served, and without it the statute is not complied with.

2. Can the defect be cured by amendment? If the officer had had a perfect paper, and the defect had been only in the officer's return, I see no objection to allowing the officer to amend his return according to the fact, at least by consent of the justices, the same as

in case of other writs of summons. It is not necessary to decide what the effect would have been if the process given to the officer had been perfect, and he had accidentally omitted to copy the certificate on the copy he left with the overseer. It may be that his return, if regular, would have been conclusive. This however, we do not decide. This process, although it is made up in part of the copy of the order, is in the nature of an original. The power to allow amendments of a paper of this description, if any power exists, is very different from that applicable to ordinary returnable process, upon which further proceedings are to be had. It is true it may be the duty of the officer to return such process to the justices, but the town is not called on to answer it there. The case does not come here directly upon this process, but by appeal from the original order of removal. The defect exists in this case in the original as well as in the copy left by the officer, and was not amendable. As to the officer's return, it is already according to the fact.

The county court properly refused to allow the amendment.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF ORANGE,

AT THE

MARCH TERM, 1864.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUSTICE,
HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
} ASSISTANT JUDGES.

FRARY ET AL. *v.* BOOTH ET AL.

Husband and Wife. Mortgage. Chancery.

A married woman contracting a debt for her own benefit, may make it an express charge on her separate estate, and her mortgage for that purpose will be supported in equity.

A husband may by his acts, as well as by express agreement, divest himself of his marital rights in his wife's property so as to make it her separate estate.

A wife left her husband in 1847. In 1852, property was devised to her, which she occupied and controlled without any interference of her husband until the present time. In 1857 she made a mortgage upon her estate to secure payment of a debt for necessaries for the support of herself and children, and in 1858 she obtained a divorce and made a second mortgage on the same property. *Held*, that though as between her and her husband the devise to her lacked the affirmative words necessary to constitute a separate estate in the strict meaning of the terms, yet under the circumstances it was to be considered her separate estate as between her and the first mortgagee.

Such first mortgage may also be supported in equity on the principle that where a married woman trades as a *feme sole*, or obtains credit on her separate estate, a court of equity will hold the proceeds of the business or the estate subject to the claims of her creditors.

Or on the principle that the estate of a married woman living apart from her husband is liable for her maintenance.

The second mortgage having been made with notice of the circumstances, has no equity to come in before the first.

The statutes of Vermont, in regard to the conveyance of married women's estates, do not affect the jurisdiction of the courts of equity over the subject of separate estates.

BILL to foreclose the equity of redemption in certain mortgaged premises situated in Strafford, Vermont. The material facts as they appeared in the bill and answers and the testimony taken, are sufficiently set forth in the opinion of the court.

The court of chancery, January Term, 1864,—PECK, Ch.,—dismissed the bill *pro forma*,—from which decree the orators appealed.

Wm. Hebard, for the orators, maintained that a married woman may either sue or be sued. 1st, when her husband has voluntarily abjured the realm, or has been banished. Coke's Littleton, 133; *Countess of Portland* v. *Prudges*, 2 Ves. 104; *Dubois* v. *Hale*, *ib.* 613; *Robinson* v. *Reynolds & Wife*, 1 Aik. 174; 2d Kent's Com. 154; *Corbet* v. *Poelnitz*, 1 Term, 6; Fonb. Eq. 101 and notes. 2d, when the parties agree to live separate, and the husband has made provision for her support. This was so at least until the case of *Marshal* v. *Rutton*, 8 Term, 546. 3d, when the husband is a foreigner and is out of the state or kingdom. *Walford* v. *Duchess de Prime*, 2 Esp. 554; *Franks* v. *Same*, *ib.* 586; *De Gaillon* v. *Victorie Hurd de Aigle*, 1 B. & P. 357; *Gregory* v. *Paul*, 15 Mass. 31; *Abbot* v. *Bayley*, 6 Pick. 89; *Love* v. *Maynham*, 16 Ill. 277.

The cases cited were all suits at law, seeking to obtain a judgment either for or against the person of a married woman, whereas this case seeks upon equitable principles to lay hold of the property of the defendant which she had voluntarily and *solemnly pledged* for the payment of necessaries delivered to her upon the faith of this property, and thus in fact becomes a proceeding *in rem* and not *in personam*.

A *feme covert* may create a charge or lien upon her property for the payment of debts contracted for the benefit of that property, or for her own benefit. *No. Am. Coal Co.* v. *Dyett*, 7 Paige, 9.

The objection that she had not the exclusive control of her estate at the time she mortgaged it has no force in this case. 1st, she had the entire and perfect legal title. 2d, her husband had abandoned her, and left her to take care of herself, which was an abandonment of any claim to control her estate. 3d, he never did assume any control of it, and before this bill was brought, she became a *feme sole*.

But we claim and insist, that the distinction which has been made by some of the cases between husbands who are aliens and those who are not, has no foundation in principle, and has not been regarded in this country. 2 Kent's Com. 157; *Bean* v. *Morgan*, 4 McCord, 148.

The terms of the will vested the property absolutely in Mrs. Booth, and it was exclusively within her control. But if it were otherwise at the time, it would not affect the *equitable consideration* of this question, as the husband never did assume any control of the estate. And at the time of bringing this bill, he had ceased to have any right to control it.

The mortgage to the defendant Moore does not take precedence of this. 1st, for the reason that the estate is of sufficient value to pay both mortgages. 2d, because in that mortgage the defendant Moore has mingled debts of the estate with his own. 3d, because he has suffered Mrs. Booth to use up the property of the estate, which he ought to have applied in settling up his administration account.

Peck & Colby, for the defendants.

1. The deed to the orators is absolutely void, the husband not having joined in the conveyance. G. S. p. 448, § 2.

All our legislation is opposed to the position assumed by the orators that the deed of the wife, under circumstances like the present, will pass her title, or create any valid lien. By a statute law of Pennsylvania, passed in 1848, the property of the wife is exempt from the husband's debts, and is to be owned, used and enjoyed by her as her separate estate, and cannot be encumbered by her husband without her consent. It is settled in that state, that this statute does not authorize her to convey her real estate, and that a conveyance by

her alone is a nullity, whether she lives with or apart from her husband. *Peck* v. *Ward*, 6 Harris, 506; *Thorndell* v. *Morrison*, 1 Casey, 326. In *Rhea et al.* v. *Rhenner*, 1 Peters, 105, the supreme court of the United States held the same doctrine in a case identical in its circumstances with the present.

2. The orators, however, seek to enforce the deed as an appointment by the wife of her "separate property" for the payment of debts contracted by her.

1st. It does not clearly appear that Mrs. Booth agreed or intended to charge this estate with the payment of these debts at the time they were contracted. 2d. The orators had no right to trust her, relying on this property, as the estate of the devisor was in process of settlement and might have been absorbed in the payment of his debts. But, 3d, what is decisive of this point is the fact that the property in question was not devised to Mrs. Booth's "separate use."

Married women are treated as *femes sole* only as to such property as is limited by express words to *their sole and exclusive use.* In the absence of such express words, it is not her *separate estate* which she can effect by an appointment or otherwise control without her husband. 2 Story's Eq. Jurisp. § 1397, Redfield's Ed.; *Butler* v. *Buckingham*, 5 Day, 492; *Albany Fire Ins Co.* v. *Bay*, 4 Cow. 9; *Martin* v. *Dowelly*, 6 Wend. 7; *Curtis* v. *Engel*, 2 Sandf. 287–9; *Knowles* v. *McConely*, 10 Paige, 343–6; Lead. Cas. in Equity, 360 note; Law Reporter Nov. 1863, p. 49.

The divorce granted subsequently cannot operate by relation to make the deed effective. 8 Cowen, 277.

3. The defendant Moore as executor paid the debts of the devisor to the amount of about $600. He as well as the creditors had a lien on the property for these debts. This lien cannot be affected by the orators' claim. Moore's lien is first, and is represented by his mortgage.

4. The orators' mortgage being *void*, if they can be regarded as having the right to charge this property with their debt, it can only be done after the defendants' lien created by their mortgage, is discharged.

Frary et al. *v.* Booth et al.

BARRETT, J. In this case the following are the facts material to the leading questions presented in the argument. Mrs. Booth was the adopted daughter of Mr. Norton, and, up to the time of her marriage, lived in his family in Strafford. Soon after her marriage she went with her husband to Canada, where he had relatives, and lived with him a short time, and then, (sometime prior to 1847,) returned to her home in Strafford with two children, issue of the marriage. Her husband has ever since remained in Canada. Till the death of Mr. Norton, in 1853, she continued to live in his family, taking a leading part in household affairs, and receiving support for herself and children, except that she furnished their clothing. In 1852, Mr. Norton made his will, giving to Mrs. Booth his home farm, stock, horses, farming tools, &c. After his decease the will was duly probated and established, and Mrs. Booth has continued to reside in the family homestead, holding, occupying, and managing the property given her by the will, supporting herself and children without any aid from her husband, and without any claim or interference by him in respect to the control, management or disposition of said property, and without any claim or offer by him to live with his wife and children; he, during all the time, being destitute of property and credit, and wholly irresponsible. After the decease of Mr. Norton, Mrs. Booth purchased goods of Frary & Co., and of other stores in which Mr. Harris was interested as partner, necessary for the support of herself and children, on credit given solely to herself, in reliance on her right and interest in the property given her by said will. In settlement of the accounts for said goods she executed the notes described in the bill in this case, and on the 12th of October, 1857, she executed to Frary a mortgage of said farm to secure the payment of said notes. At the General Term of the supreme court in November, 1858, she obtained a divorce from her husband, after which, and on the 24th day of said November, she executed a mortgage of the same property to J. S. Moore, as set forth in his answer. Mr. Moore was executor of said will of Mr. Norton, which will made the debts of the testator, and the expense of settling his estate, a charge upon a piece of land in Granville, in case what should be due to the estate should prove insufficient for that purpose.

Mrs. Booth makes defence on the ground that she was *feme covert* when the orator's mortgage was executed, and that she gave it upon compulsion by threats of suit and the attachment of her property. Mr. Moore defends on the same ground, and insists that his mortgage is entitled to priority. He also defends on the ground that, as executor, he has paid the debts of the testator and the expense of administration under the will, out of his own money; and, in any event, claims that he is entitled to a lien upon said mortgaged property for such payment, in priority to the orator's mortgage.

Upon the facts thus stated, with other incidental facts which will appear in the course of the discussion, it is to be determined whether the orators are entitled to enforce against the property the security which said mortgage purports to give.

Before presenting the views of the court upon the main grounds upon which the case was discussed in the argument, we remark, that we do not concur with the learned counsel for the defence, in assuming as a conclusive proposition, that the mortgage executed by Mrs. Booth to the orators is wholly void. At common law, and irrespective of the statute of this state, it would be void and ineffective; and it would be equally so in equity, unless the purpose, occasion, and circumstances of giving it, bring it within the operation of principles upon which courts of equity give such instruments a legitimate vitality and effect. Sec. 2, p. 448 of G. S.:—"A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried," and the provisions of ch. 71 of G. S., by which the wife may, in case of desertion or ill-treatment by the husband, make disposition of her property without his joining in the deed, do not affect the subject as it is involved in and presented by this case. The first of said enactments does not declare the sole deed of the wife void, nor does it imply that it is, except as resulting from the effect of coverture at common law. It has regard only to the effect of that relation at common law, and was designed to provide a mode by which she might transfer the title to her real estate at law, notwithstanding the common law effect of coverture. It is an *enabling* and not a disabling or restrictive act, and can by no means be regarded as trenching upon the scope of equitable jurisdiction and interposition in reference to

the rights, liabilities, and duties of married women in respect to their property and contracts.

In *Buchanan* v. *Chamberlin et al.*, in Orange county, 1858, (not reported,) a mortgage, given by the wife to secure the payment of money borrowed to pay towards the purchase of the mortgaged property, was held valid against the husband and the children, the wife having deceased.

The latter of said statutory provisions was designed to give, not an *exclusive*, but an additional and somewhat summary means as against the husband, for insuring to the wife the use and benefit of her own property for her support, in case she should be abandoned by, or compelled by ill-treatment to live apart from him. They cannot, upon any ground of reason, be construed as taking away or curtailing the scope of interposition by courts of equity in cases falling within the ordinary cognizance of such courts.

Passing, without further remark, the point made in defence upon the statutes referred to, we come to the more important ground of debate.

In courts of equity, for many purposes, the separate and unmerged existence of the wife, both in respect to her person, her property, and her contracts, is recognized, asserted, and made the ground of action to the same extent as if she had not been married; and the course of adjudication has now pretty clearly defined the principles, and indicated the category of cases upon and in which this may properly be done. Within the scope of those principles and cases, there are many cases in which, for the purpose of protecting the wife, and of doing justice to other parties, the wife has been treated as *feme sole sub modo*, and to a limited extent, in respect to contracts made by her, and in respect to rights and interests in property held by or accruing through her.

Though cases at law were largely cited in the argument by orators' counsel, but little aid can be derived from them in dealing with this subject in the forum of equity. Some analogies of principle, and some deductions of reason from them, may give more or less countenance to the doctrine held and administered by courts of equity, but the cases themselves can hardly be regarded as establishing either principles or rules that control or direct the action of those courts

It is to be determined, therefore, whether the principles and cases which appertain to this subject in those courts, require the relief to be granted that is invoked by this bill.

In England it is established law in equity, that a *feme covert* has the same power of charging or appropriating her *separate* estate, as if she were *feme sole*, unless there be a restriction in the instrument by which she is invested with such estate. The main and important difference in respect to the extent of such power in her, as held in England, and by the courts of different states in this country, consists in this,—in some of the states it is held that she can charge or appropriate her separate estate only in such manner and to such extent as she is expressly authorized to do by the instrument of conveyance or settlement; while in others it is held that she can charge or appropriate it for her own benefit, or for the benefit of her estate, as fully as if sole, provided there be no restriction in this respect in the instrument of conveyance or settlement. The English rule has been adopted in Connecticut. In *Imlay* v. *Huntington*, 20 Conn. 146, STORRS, J., in the course of an elaborate opinion, says:—"We adopt the English rule, not only as supported by the highest authority, but because we think it is also supported by the strongest reason." The same is reasserted in 32 Conn.

In New York, in the case of *The Methodist Episcopal Church* v. *Jaques*, 17 Johns. 548, upon the fullest consideration by the court of error, the English rule was approved and maintained, though it may be regarded as subsequently limited to the charge or appropriation by the wife for the benefit of herself or her estate. In *N. A. Coal Co.* v. *Dyett*, 7 Paige, 9, it is held that "the *feme covert*, as to her separate estate, is considered as a *feme sole*, and may in person, or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit, upon the credit of the separate estate." And the same doctrine is held in *Gardner* v. *Gardner*, 7 Paige, 112. In this last case, when in the court of errors, 22 Wend., COWEN, J., held the following language:—"If the wife holds an estate separate from and independent of her husband, as she may do in equity, chancery considers her, in respect to her power over this estate, as a *feme sole;* and although she is still incapable of charging herself at law, and equally incapable

in equity of charging herself personally with debts, yet I think the better opinion is, that separate debts, contracted by her expressly on her own account, shall, in all cases, be considered an appointment or appropriation for the benefit of the creditors, as to so much of her separate estate as is sufficient to pay the debts, if she be not disabled to charge it by the terms of the donation."

The same rule as in *N. A. Coal Co.* v. *Dyett, supra*, is recognized by the Vice-Chancellor, 2 Sanf. Ch. Rep. 287, in *Curtis* v. *Engel*, and is explicitly sanctioned in *Yale* v. *Dederer*, 18 N. Y. 265. It is true, in this case, when again before the court of appeals, 22 N. Y. 450, SELDEN, J., attempts to weaken the stability of the law as thus held and adhered to in New York. While we cannot accord success to the attempt, yet it is pertinent to the case in hand to remark, that the court hold in that case an *express* charge, created by a married woman upon her separate estate for her own benefit, to be valid in equity.

In the recent case of *Todd and others* v. *Mrs. Lee and husband*, 15 Wis. 365, DIXON, C. J., upon an extended examination and discussion of the subject says:—" Within all the authorities, the separate estate of a married woman will be charged in equity with the payment of debts contracted for her benefit."

The lack of general equity powers in the courts has, perhaps, precluded the adjudication of the subject in the New England States, except Connecticut and Vermont; and in Vermont it has not before been called into judgment. We are prepared, however, to adopt the principle of the law as established in England, Connecticut and New York, to the extent, at least, that a married woman may charge her separate property for her own benefit, (and that is all that the present case requires,) regarding it as resting in sound legal and moral reasons, and resulting in securing to the wife all proper protection, while effectuating justice between her and those with whom she has dealt with reference to and upon the credit of her separate property.

This brings us the question,—was the property embraced in the mortgage of Mrs. Booth to the orators, her *separate* property, within the true intent and spirit of the law, as held and administered upon this subject, in a legitimate application of it to the facts of this case?

The will of Mr. Norton gave it to her alone, without condition or limitation, its language being, "I give and devise to Adeline Booth, of Strafford, all my home-farm, so called, consisting of about sixty-three acres, and also I give and bequeath to her all my stock and horses," &c., &c. It is clear, upon well-established principles applicable to title created by will, that she was vested with an absolute estate in fee in the farm, subject only to the marital rights of the husband. *Separate estate* in a married woman involves, as the characterizing fact, that she holds it to her sole use, in exclusion of the marital rights of the husband. If the will had expressed it to be to her sole use, in exclusion of the right of the husband to control or dispose of it, it would have been her *separate estate* in the fullest legal sense and effect of the expression, though it was land given to her directly, without the interposition of trustees. In the earlier English cases, adopting the doctrine of the subject from the civil law, the *separate property* consisted in personalty invested, with provision that the wife should have the proceeds to the extent and in the manner specified, or the income and proceeds of lands held by trustees. This, indeed, has been true of most of the cases throughout the whole course of adjudications upon this subject in the English equity courts. Hence, upon a cursory view, the impression is easily derived, that *separate estate* is predicable only of personalty invested, or of the income of real estate vested in trustees. Even PRATT, J., in a dissenting opinion in *Albany Fire Ins. Co.* v. *Bay*, 4 Coms. 27, says:— "*Separate estates* in married women, which courts of equity recognize their right to dispose of as *femes sole*, are strictly equitable estates. They are always created by deed, devise, or marriage settlement, vesting the legal estate in some third person." But in the American note to the case of *Hulme* v. *Tenant*, 1 Lead. Cas. in Eq. p. 417, it is said, "the intervention of a trustee is not necessary to the validity of a trust to the separate use of a married woman. If real or personal property be given to her separate use, her interest will be protected by converting the husband into a trustee;" and a large number of American cases is cited, which establish this as the law in this country. The case of *Fanny Porter* v. *Bank of Rutland and others*, 19 Vt. 410, adopts and stands upon this view of the law. Indeed, the necessity of an actual or even an ideal trust,

in order to constitute a separate estate of the wife, which she may bind for the payment of her debts, has been abandoned in England, as appears by the case of *Owens* v. *Dickinson*, 1 Craig. & Phil. 48, and by the still later case of *Johnson* v. *Gallager*, 7 Lond. Jur. N. S. 273; and it is now held that such estate may exist without the fact or fiction of a trustee, and be directly reached by execution out of the court of chancery.

As before remarked, the will gave to Mrs. Booth an absolute title to the real estate; and we receive the impression from the peculiar language of the deed, in giving it to her without naming heirs, in connection with the fact that she was, and for a long time had been, living apart from her husband, with the burden of supporting herself and her children cast upon her, without any care or aid from him; that it was the intention of the testator to give her the property named, both real and personal, as her separate property. But it would, probably, be going too far to say that the will itself, as an instrument conferring title, can be held to have that effect. It lacks the ordinary affirmative expressions which have been held requisite to exclude the husband from his marital rights in property thus coming to the wife.

As already said, *separate estate* in a married woman involves, as the characterizing fact, that she holds it to her sole use in exclusion of the marital rights of the husband. The cases uniformly show that the law of the subject had its origin, and has been developed, established, and applied, with reference to claims made by the husband, or by those standing in his right, in virtue of his marital rights, as against the exclusive right of the wife to the property in question. In such cases the rule has become established that the instrument of conveyance or settlement must contain explicit words of exclusion in order to shut out the husband and his assigns from his marital rights.

But in the present case, neither the husband, nor any one under him, is claiming any right in the property. The will was made during his separation from his wife; the testator died, and the will took effect to pass the title to Mrs. Booth while the separation was continuing. She was left by the testator at his death in the possession of the property as her home and resource for support,

and she continued ever after in that possession, controlling and managing the property, without any interposition or claim by her husband; being (as before said) left by him to support herself and children, without any contribution or offer of aid by him in that behalf. This, we think, may properly be regarded as a practical and continuing negation, on his part, of any right or interest in the property, in virtue of his marital rights,—a practical and continuing construction and effect given to the will, as giving to the wife the absolute title in exclusion of himself as husband, —an effectual appropriation of the property to her sole and separate use.

If the husband, by an ante-nuptial agreement, had stipulated that the property coming to the wife during coverture, should be her sole and separate property, and subject to her exclusive disposal, such agreement would be effectual in equity to disembarrass the wife from any marital restraints in the disposition of such property. See *Barron* v. *Barron et al.*, 24 Vt. 375, in which the cases involving the subject are extensively examined and the law ably discussed by ISHAM, J.

So, too, a post-nuptial agreement of a similar character, made upon sufficient consideration (as, for instance, that the wife should support herself, or herself and children, without calling on the husband therefor, if performed by the wife,) would in equity be held equally effectual. True, there was no such agreement, in terms, in this case. Still, we think the facts before stated put the husband in the same relation to this property as if there had been. We think no principle nor rule of the law is infringed in the present case, in which the question does not arise upon a claim by the husband or in his right, by holding that property which the wife holds by absolute title and disembarressed of any claim resting upon the marital rights of her husband, is to be regarded as her separate property, within the principles and in subserviency to the purposes of the law governing the subject; and that in such case it makes no difference in what way it is invested with such character of separate property. If it is thus held by her, then, in equity, she has power to charge it for her own benefit the same as if she were discovert.

We therefore hold that Mrs. Booth, for the credit which she had

obtained, was warranted in making the debts a charge upon the land thus owned by her, and that the mortgage to the orators, which we find to have been given voluntarily and without compulsion, constitutes an express charge upon, and appropriation of, the property for the payment of the debts specified therein.

There is another line of judicial administration in equity, the principle of which seems ample to warrant this court in effectuating the pledge of the property for the payment of the debts in question; and that is, cases where the wife, with the consent of the husband, has carried on business in her own name as sole trader or otherwise. It is established beyond controversy, that the property and proceeds of the business may be held by the wife's creditors, for the payment of the debts contracted in that business, against any claim or right of the husband, and, in most cases, against his creditors. This was recently held by this court in a case in Windsor county, *Partridge & Co.* v. *Stocker et al.*, 36 Vt. 108. See Story Eq. § 1385–6–7, in which last section it is said:—"If a husband should desert his wife, and she should be enabled by the aid of friends to carry on a separate trade (as that of milliner), her earnings in such trade will be enforced in equity against the claims of her husband." This all goes upon the ground that the creditors of the wife have an equitable right to the property and proceeds of the business, in reliance upon which they extended to her the credit. As *against the wife* that right is plain, and was never called in question. It has only been controverted upon some counter claim of the husband, his assigns or creditors.

Where, therefore, the wife, as in this case, has title to property which the husband permits her to hold, use, and dispose of for the support of herself and children, in his neglect to do anything in that behalf—he interposing no claim in respect to said property, and she has obtained credit for the necessary means of living in reliance upon such property, and has expressly pledged it as security for the redemption of such credit, it would seem to be interpolating a new principle both in equity law and in ethics, to hold that she, or those standing in her right, may, in virtue of a technical rule of marital disability, evade that equity of her creditors. It would be matter of some difficulty to assign a plausible, much more a solid reason for so holding. It certainly could not be on the score of any countervailing

equity in her, for none such exists, but the contrary. Nor could it be on the score of disability, for that is excluded by well-known rules and settled principles of equity law.

The result of the views already presented seems to be fully warranted upon other grounds.

There are several ways, upon well-settled principles, in which, as against the husband, the property of the wife would be subjected to the support of herself and children.

In *Guy* v. *Pearkes*, 18 Ves. 196, the Lord Chancellor ordered the *Accountant-General* to sell stocks held under a will by a legatee whose husband had deserted her soon after marriage, and for several years had furnished nothing for her support, and to repay advances made from year to year by a friend of the wife for her support, who made such advances upon the faith of being repaid out of that fund, and that the dividends of the remaining fund be paid to her for her future support.

In the American notes to *Murray* v. *Lord Elibank*, Lead. Cas. in Eq. vol. 1, p. 496, it is said, "there is a class of decisions which indicate that, where the husband has misbehaved, and abandoned or ill-treated his wife, so as to justify a divorce or separation, the wife's property in action, and it seems also even property not under the jurisdiction of the court, will be laid hold of by the court of chancery and appropriated to the support of the wife and her children;" and several cases to that effect are cited in different states. It is further said: "It may probably, also, be considered as established, that if the husband is entirely insolvent, and the wife is without means of support, equity will sustain a bill by the wife, through her next friend, against the husband, or his assigns or creditors, seeking to get possession of the property at law;" and several cases to that effect are referred to.

In *Haviland* v. *Myers*, 6 J. C. R. 25, Chancellor KENT said: "The rule was settled that the wife's equity to a suitable provision for the maintenance of herself and her children out of her separate real and personal estate, descended or devised to her during coverture, was well established, and would prevail equally against the husband or his assigns, and against any sale made or lien created by him, even for a valuable consideration, or in payment of a just debt; * * *

and this equity might be extended, if the circumstances of the case should require it, to the *whole* of the real and personal estate so devised or descended to the wife." This savors strongly of the idea that even as against the husband and those standing upon his right, the courts recognize a *separate estate* in the wife, for certain purposes, which was not created such by express terms,—for in that case the property was *inherited*,—not devised or conveyed by deed: See *Drummond* v. *Magee*, 4 J. C. R. 318. In closing a full, elaborate, and discriminating review of most of the cases bearing upon the wife's rights in equity as to her own property, it is said in the note above cited, on p. 501: "The maintenance of the wife from her own property, in cases of the husband's neglect to provide for her, is, no doubt, a ground of original jurisdiction to be exercised upon a bill filed by her."

What has thus been said in the note, as above cited, and held in the cases referred to, we regard as sound in principle, and sustained by ample reasons. In the light of the law as thus established and administered, we think it would have been the clear duty of the court of chancery, upon the facts shown in the present case, upon the application of Mrs. Booth, as against any attempt of her husband to control or dispose of the property coming to her under Mr. Norton's will, to interpose in her behalf, and secure support for herself and children out of said property; and in case of such support having been obtained on her credit, and in reliance on said property, to subject said property to the redemption of such credit, as a condition of entitling the husband to assert his marital rights in respect to it.

She, without occasion for invoking aid from that court, and with the acquiescence, at least, of her husband, made use of that property for just the purposes, and in just such a way, as a means of obtaining support for herself and children, as the court of chancery would have authorized her to make. Upon the strength of it she obtained credit for necessaries, and pledged it for the redemption of that credit. It is now submitted whether such use and disposition of it will be upheld and effectuated. At this point it is worthy to be repeated as a striking feature of the case, that not Mr. Booth, or any one standing in his right, but Mrs. Booth and her subsequent grantee in mort-

gage, are claiming to avoid the legitimacy of the use and disposition she made of the property in her transactions with the orators. No case is cited and no reason is assigned, *bearing upon the equities* growing out of those transactions, or the relation of the parties, why the defendants should be permitted to assert the invalidity of the orators' security. But the defence is rested upon implications educed from certain statutory provisions and upon arbitrary technical rules. We think the former are not warranted, and that the latter are inapplicable.

As between Mrs. Booth and the orators the equity is clear, and there is no warrant, either in law or morals, for permitting her or her subsequent mortgagee to call in question the validity of the security given by her to the orators.

As Mr. Moore took his mortgage with full knowledge of the existence of the mortgage to the orators, he is not entitled to the priority which he claims by reason of it.

As to his claim of a lien on the mortgaged property by reason of payments made by him as executor, nothing is shown in the case why the land in Granville and the debts due the estate have not been resorted to according to the provisions of the will. In order to entitle him to assert a lien upon the home-farm to affect any legitimate disposition that has been made of it, it is incumbent on him to show that the provision made in the will for the payment of debts and expenses, has been faithfully administered, and has proved inadequate. As to all this the case is entirely silent. There is, therefore, no ground for the lien claimed.

The *pro forma* decree of the chancellor is reversed, with costs, and the case remanded for a decree of foreclosure according to the prayer of the bill.

RUFUS M. HUBBARD, *Administrator of* JOSEPH HUBBARD, *v.* GILMAN B. DUBOIS, HARVEY LAMSON, EDWARD HOBART AND JONATHAN NEWELL.

Judgment. Record. Evidence.

Where the record of a judgment shows that the writ issued against four defendants but service was made on two only, and proceeds as follows: "And at the same term come the said defendants by their attorney," naming him, and then goes on to state the proceedings to a final judgment against the defendants, without naming them after the recital or copy of the writ and return, it is *held*, that the record shows an appearance for those defendants only upon whom service had been made.

In an action upon a judgment rendered upon the report of an auditor, it is *held*, that copies of the auditor's report and of the rule, citation, and officer's return thereon, are admissible in evidence, not to contradict the record, but in connection with and as aiding to explain the meaning of the record itself when that is doubtful or equivocal.

DEBT on judgment alleged to have been obtained by Joseph Hubbard in his lifetime, against the defendants and one Edward Hobart, since deceased, as joint contractors, at the June Term of Addison County Court, A. D. 1855, to which the defendant Dubois pleaded, first, that there was no record of said judgment remaining in said court; second, that the alleged judgment was rendered without any service of the writ upon him or upon his property, or without trustee process and without any notice whatever to him, either by publication or otherwise, of the pendency of any suit, &c.; to which the plaintiff replied, first, that there was a record of, &c., and second, that the said Dubois appeared by attorney, &c. And the defendant, Dubois, made rejoinder, upon which issue was joined. Trial by the court by agreement of parties, June Term, 1863, PECK, J., presiding.

On trial the plaintiff introduced in evidence a duly certified copy of the record of said judgment, which after setting forth the writ and return—the return showing a service upon Harvey Lamson and E. Hobart only—proceeded as follows; "And at the same term come the said defendants by their attorney, J. P. Kidder, and by consent of parties it is ordered by the court that the defendants do account with the plaintiff, and that John Pierpoint be appointed auditor, to hear, examine and adjust the accounts of the

parties, and make report thereof to this court at their next term, &c. * * * * And now, to wit., at the term last aforesaid, come the said parties by their said attorney, and also comes the said auditor and makes report as follows: The undersigned auditor reports that he notified the parties before him at, &c., * * * * to audit their accounts as per rule and notice annexed; at which time and place he attended, and the said parties before him, in person and by counsel,—and the auditor finds that there is due from the defendants to the plaintiff, to balance accounts, the sum of $458.51." J. Pierpoint, auditor.

No question was made but that J. P. Kidder was a duly enrolled attorney and counsellor. The defendant, Dubois, offered in evidence a certified copy of docket entries in the cause in which said judgment was obtained, made at the December Term of said Addison County Court, A. D. 1854, and at the June Term thereof, 1855; also of the report of the auditor, rule, citation and officer's return thereon, which was objected to by the plaintiff, but was received and read, subject to objection,—to the admission of which the plaintiff excepted.

The defendant Lamson was defaulted, and judgment rendered against him in this case. No service of the writ in this case was made on the defendant Newell, neither was there any appearance for him. The court decided that upon the face of the record introduced by the plaintiff, it did not appear that Kidder appeared for and in behalf of said Dubois, nor that any judgment was rendered against said Dubois. The court did not treat the copy of docket minutes as any part of this case. Thereupon the court rendered judgment in favor of the defendant Dubois,—to all which decisions the plaintiff excepted.

John Rowell, for the plaintiff, maintained that the record showed an appearance for Dubois by attorney. *Blood* v. *Crandall*, 28 Vt. 396. An appearance must be taken to be general unless the contrary appears. Again; the defendants in the original action were sued as "joint contractors," and it must be presumed they were such, as the case shows nothing different. Then if jointly liable the judgment must have been against *all* or *none*. The defendants upon whom process was served must have understood that Kidder appeared for the other parties defendants in the suit, as well as for themselves, else

they would never have submitted to a judgment against them; neither would the court have rendered the judgment they did, had they not had the same understanding.

A. P. Hunton, for the defendant Dubois, maintained that the copies of papers offered by the defendant were admissible in evidence, because they were a part of the record. 3 Co. Lit. 322; 3 and 4 Black. Com. Appendix; 1 Green. Ev. § 521; 28 Vt. 397. Moreover the court in deciding the case treated those copies as out of the case; and so regarding it, there was no error in the judgment. The return is copied into the record and shows no service on Dubois. So he was out of the case—was not a defendant. *Society, &c.*, v. *Ballard*, 4 Vt. 119; *Clark* v. *Freeman*, 5 Vt. 122. The court had no jurisdiction over him. *Skinner* v. *McDaniels*, 4 Vt. 418. And he would not subsequently be made a party but by some act shown by a positive and unequivocal statement in the record. The word *defendants* in the sentence, "At the same term come the said defendants," in the record meant those only named in the return as having been served with process. In cases where parties have been bound by the appearance of an attorney there was some kind of service as to them, or the record would admit of no other construction.

POLAND, Ch. J. It is now well established law, that where the record of a judgment shows that the defendant appeared by attorney, such fact cannot be traversed or denied by him, nor will he be permitted to show that such attorney had no authority to so appear, and the judgment will effectually conclude him. *St. Albans* v. *Bush*, 4 Vt. 58; *Newcomb et al.* v. *Peck et al.*, 17 Vt. 302.

In this case, the sole question is upon the proper construction of the record given in evidence; does it show that the defendant Dubois did appear by attorney? The record incorporates at length the writ and return of service thereon. From this it appears that the writ issued against Lamson, Hobart, Newell and Dubois as defendants, but service was made only on Lamson and Hobart. Immediately following the recital of the writ and return of service the record proceeds as follows: "And at the same term come the said defendants by their attorney, J. P. Kidder," &c., and proceeds to state the proceedings to a final judgment against the *defendants*. The defendants are not named in the record, after the recital or copy of the writ and return.

Now what is the fair and reasonable interpretation of the word *defendants*, taken in connection with all that appears in the record; does it mean all the persons named in the writ as defendants, or only those upon whom service had been made, and who had been legally brought before the court? The court had no proper jurisdiction over those upon whom its process had not been served, and could render no judgment against them, unless they voluntarily waived their right to be legally notified of the suit, and submitted to the jurisdiction of the court, by appearing in the cause either in person or by attorney. The whole power of the court over them rests upon their appearance, and therefore it seems just to hold that the record should show clearly and unequivocally that they did appear, and should not be assumed upon any doubtful or questionable construction of language. The word defendants is just as properly applicable to two defendants as to four.

The language follows the writ and return, which shows that two of the persons against whom the writ issued had been properly notified, and were properly before the court, and the others had not been notified and were not before the court at all, unless they had volunteered to come in. In this condition of things it seems to us that the more natural and reasonable interpretation is, that the appearance was for the former only, and not for the latter. At any rate it is too doubtful and uncertain to furnish that positive and conclusive bar upon those defendants not served, which is created by the record of an appearance in a suit.

The case of *Blood* v. *Crandall*, 28 Vt. 396, is conceded to be the strongest authority for the plaintiff which our reports contain. In that case the record showed that the writ was served on one defendant named in the writ, and not upon the other. The record stated that "the defendants came by A. B., their attorney, and the defendants confessed that they ought to account, &c., and it was considered by the court that the plaintiff recover of the defendants, &c." It was decided by the court that this record shew an appearance for both defendants—as well the one not served as the one who was. But the use of the plural, *defendants*, throughout the entire record, was not consistent with the fact of the appearance being for one only, and there being but two persons named as defendants in the entire

proceeding, the fair and reasonable intendment was that the word defendants referred to both, and that the appearance was for both. The point seems to have received but slight consideration in that case, but we are not prepared to say it was not correctly decided. But the case is so clearly distinguishable from this, that giving it its utmost force, it will not warrant a holding that this record shows unequivocally and clearly an appearance for those defendants upon whom the writ had not been served.

It appears from the exceptions that on the trial the defendant Dubois introduced a duly certified copy of the rule to the auditor, the citation from the auditor to summon the parties to appear before him, and the service of it, and also the auditor's report. These papers were objected to by the plaintiff, but admitted in evidence by the court. But the court say that in making their decision, they made it solely upon the record which the plaintiff had introduced, and without reference to the copies of the papers introduced by the defendant. But these papers are referred to in the exceptions, and sent up as a part of the case. We do not see why they were not admissible. Properly they should be made a part of the record, as they were a part of the proceedings which resulted in the judgment, and though they were not incorporated into the record, still, when duly authenticated, we do not see why they were not admissible, as a part of it, or in connection with it.

The more usual course is not to incorporate the original writ and return into the record, but to refer to it as on file, but the constant practice is to send with the record, and as a part of it, an exemplification of the writ and return.

It may be true that these should not be allowed to contradict the record proper, but they may be considered in connection with it, and as aiding to explain the meaning of the record itself, when that is doubtful or equivocal.

In these papers Lampson and Hobart alone are named as defendants in the suit, making it clear that the appearance of Mr. Kidder was for them alone, and not for Newell and Dubois.

But without this, and upon the record alone introduced by the plaintiff, we think the court correctly decided.

Judgment affirmed.

MERRILL G. BEARD *v.* THOMAS MURPHY.

Practice. Action on the Case. Water Course.

If a party claims that an error has been committed upon the trial, against his legal rights, he must make it appear affirmatively upon the record.

If a man violates the rights of another by a wrongful act, the latter has the right by law in a peaceable way to prevent it, and save himself from harm if he can, and to use the necessary means to that end, even if such means produce some incidental hurt or damage to the former.

The surface water flowed naturally from the plaintiff's land on to the land of the defendant. The plaintiff was in the habit of pouring filthy water from his kitchen on to the defendant's premises, which ran into and injured the defendant's well. *Held*, that after giving notice, the defendant might erect an obstruction so as to prevent this injury even if it resulted in turning back the surface water on to the plaintiff's land to his injury.

ACTION ON THE CASE for damages alleged to have been caused to the plaintiff by an excavation made by the defendant upon his land, lying adjacent to that of the plaintiff, and for other damages. Plea, the general issue. Trial by jury, January Term, 1863, PECK, J., presiding.

The plaintiff and defendant were adjoining land owners. A few years previous to the grievance complained of the plaintiff or his grantors erected some buildings on his lot, the underpinning wall of which, on one side, was built on the division line, sunk some two or three feet below the surface, and built about as far above the surface.

In the years 1858–9 the defendant erected a building on his lot opposite the plaintiff's buildings, and excavated for a cellar and underpinning wall close up to the said wall of the plaintiff.

The plaintiff's evidence tended to show that the defendant dug his trench about three feet below the bottom of the plaintiff's wall, and that without giving any notice to the plaintiff, and thereby caused his said wall to settle, and his barn to sag and reach over a little; that he notified the defendant of the effect of his digging, and they agreed to build a joint wall together, sufficient for both buildings to rest upon, and proceeded under said agreement.

The defendant's evidence tended to show that he gave notice to the plaintiff before he began to dig, and that the sagging of the plaintiff's buildings was caused by digging the trench for their joint

wall, under their said agreement. The plaintiff's evidence also tended to show that when his kitchen was built it was necessary to fill in dirt on the inside of the underpinning wall to the kitchen, and the effect of the defendant's said digging was to cause the wall to this kitchen to settle so that this dirt ran over the wall on to the defendant's land.

It further appeared that the land descended from the plaintiff's kitchen door towards the defendant's lot, so that the surface water flowed on to the defendant's land. Not far from the division line between the lots the defendant had a well which supplied his house with water. The plaintiff and his tenants were in the habit of throwing filthy water from their kitchen under the line fence and on to the defendant's land, and the same flowed on the defendant's land to his said well and rendered the water in it unfit for use. To prevent this injury the defendant put up a board and filled in with clay, so as to turn off such filthy water from his well, and in doing so caused the surface water that naturally flowed on to his land from the plaintiff's land, to turn off into a well of the plaintiff, to its injury. The defendant's evidence tended to show that he notified the plaintiff and his tenants of the effect of their slops upon his well, and requested them to desist, but they still continued the practice.

The plaintiff's counsel requested the court to charge the jury that if they found that the defendant's digging was done without notice to the plaintiff, and caused injury to the plaintiff, the defendant was liable for the injury; that if the plaintiff's land slid off on to the defendant's land, either under or over the plaintiff's underpinning wall, in consequence of the defendant's excavation, and that this was made without notice to the plaintiff, then the plaintiff is entitled to recover.

The court told the jury that if the defendant supposed, or had any reasonable ground to suppose that his digging would cause any damage or injury to the plaintiff's wall or building, or if a prudent and skilful man in such matters would have supposed, or had any reason to suppose such digging would be likely to have that effect, then the defendant was bound to give such previous notice to the plaintiff that he was about to dig there in the manner he did dig, and that in such case a neglect to give such notice would make the defendant liable for all the injury done by the digging he did before such notice to the

plaintiff. That otherwise the defendant would not be liable from the mere fact alone of not giving notice.

To the neglect to charge agreeably to such request, and to the part of the charge above detailed, the plaintiff excepted.

The substance of the charge in respect to the defendant's turning the surface water on to the plaintiff's land so as to injure his well is given in the opinion of the court. To this also the plaintiff excepted. Verdict for the defendant—exceptions by the plaintiff.

Dickey & Clark, for the plaintiff, maintained that there are two classes of cases in the books. (1.) Where an adjoining proprietor digs upon his ground so near his neighbor's land as to disturb his walls and buildings. (2.) Where by such digging he removes the support of his neighbor's soil so that it slides off.

In the first case he is bound to exercise skill, care, and prudence in the manner of his digging, and if a prudent and skilful man would have reason to apprehend danger, he would be bound to give his neighbor reasonable notice of his intention to dig, that he may protect his property from injury.

But the latter case does not involve a question of negligence at all. The right of the plaintiff to his soil is absolute, and so his right to support for it against his neighbor's soil, and the defendant had no right to disturb it in any way. It is not a question of *reasonable* support. *Jones* v. *Bird*, 5 B. & Ad. 837, (7 E. C. L. 455); *Wyatt* v. *Harrison*, 3 B. & Ad. 870, (23 E. C. L. 380); *Dodd* v. *Holme*, 1 Ad. & El. 493, (28 E. C. L. 240); *Massey* v. *Goyder*, 4 C. & P. 161, (19 E. C. L. 456), are cases of the first class.

Richardson v. *Vt. C. R. R. Co.*, 25 Vt. 465; *Thurston* v. *Hancock*, 12 Mass. 220; *Humphries* v. *Brogden*, 12 Ad. & El. 739, (64 E. C. L. 739); 2 Hill. on Torts 9 and 10; *Sutton* v. *Clarke*, 6 Taunt. 44.

The defendant had no right to obstruct the waste water so as to turn the surface water back on to the plaintiff's land to his injury.

R. McK. Ormsby, for the defendant.

POLAND, Ch. J. It is now well settled that the owner of land is entitled to have it supported and protected in its natural condition, by the land of his adjoining proprietor, and that if such adjoining owner remove such natural support, whereby the soil of the former is disturbed, or falls away, he is legally liable for all damage so occa-

sioned. And we are not prepared to say but that the plaintiff's counsel are quite right in saying that his liability in such case cannot be made to depend upon his mode of doing the act, or whether he acted prudently or negligently, in reference to what would be the probable effect of his act upon his neighbor's land. This view is supported by the case of *Humphries* v. *Brogden*, 12 Ad. & El. 739, which is a very thoroughly considered case, and we are inclined to believe the current of decisions will be found in conformity with that, but we have not deemed it necessary to enter into any extended examination of the cases.

It is also equally well settled, that the owner of land is not entitled to claim the support of the adjoining soil for any artificial structure he may erect upon his land, which increases the lateral pressure, and that for any damages to such artificial structure, caused by the removal of the natural support of the soil by such adjacent proprietor, he is not liable, unless he is guilty of carelessness and negligence in his manner of making the removal, or he fails to give prior notice thereof to the owner of the structure, so that he may take the necessary measures for the protection and preservation of his property from the consequences of such act. See *Richardson* v. *Vt. Central R. R. Co.*, 25 Vt. 465, and cases cited.

The plaintiff concedes that the charge of the court to the jury was entirely correct so far as related to any claim for damages for any disturbance or injury to his wall or buildings occasioned by the digging of the defendant upon his adjoining land to lay the foundation for his building. This really was the only substantial damage the plaintiff sustained by the defendant's act; if this can be said to be so, and it seems from the exceptions, that this was really what the plaintiff sought to recover for upon the trial. But the exceptions say that the plaintiff's evidence tended to prove that in consequence of the digging by the defendant, the wall which supported the plaintiff's kitchen, which stood upon the line, settled a little, so that dirt ran out from under it upon the defendant's land, and some of the dirt which the plaintiff had piled or banked against his wall, on his own land, ran over the wall and fell upon the defendant's land. The plaintiff now complains that the jury were not put to find upon the evidence, whether if the plaintiff's land was in its natural condition, without

any wall or buildings upon it, the defendant's act of excavating would not have caused the plaintiff's soil to be disturbed, and so that the plaintiff might be entitled to recover, irrespective of any question of notice, or of prudence and skill in the defendant's manner of making the excavation. But the case shows that the plaintiff had erected his wall upon the extreme verge of his land, and upon such wall had placed buildings. The real damage he was claiming to recover, was the damage to his wall and buildings, and the fall of the earth from the plaintiff's land under or over his wall, appears to have come out rather as part of his proof of the transaction by which the structures were damaged, than as any distinct ground of claim of recovery.

The changes made in the natural condition of things, by the erection of the plaintiff's wall and buildings, were so great that it would be mere conjecture as to what effect this excavation would have produced if they had not been made.

It seems perfectly clear that the dirt which fell over the wall, could not have so fallen, if nothing artificial had been placed by the plaintiff on his land, because that earth itself was piled or banked against the wall, on the inside, and was itself an artificial burden on the natural soil. From what appears in the case, it does not appear that there was any fair ground of claim, that if there had been no increase of the natural weight and pressure upon the soil, on the plaintiff's side of the line, that what was done by the defendant on his land would have disturbed the plaintiff's. But this was of course a question for the jury to pass upon, if such a question had been made. But we fail to find in these exceptions that any such point was made by the plaintiff, or that the attention of the court was called to any such theory of claim, or instruction to the jury claimed on such basis. The request to charge the jury upon the damage to the soil, is put on the same ground as the damage to the wall and buildings; that the excavation was made by the defendant without notice to the plaintiff. We cannot manufacture or imagine errors for the purpose of correcting them. The party claiming that an error has been committed upon the trial, against his legal rights, must make it appear affirmatively upon the record, and none is so made to appear in respect to this point.

The plaintiff also claims that the charge was erroneous as to the stopping of the surface water by the defendant, by putting up boards. The plaintiff claimed that if the surface water naturally falling on his land would run off upon the defendant's land, the defendant had no right to put up any obstruction to prevent its continuing to do so.

This the court granted and charged to be the law.

The court also told the jury that if the plaintiff or his tenants persisted in emptying filthy water from the plaintiff's kitchen where it would run down on the defendant's land, and injure his well, the defendant might legally place an obstruction to prevent it. The plaintiff does not question the soundness of this proposition, and its eminent justice would commend it to every fair mind. But the court further told the jury, that if such an obstruction as was actually necessary in order to prevent injury to the defendant, from the persistent and unlawful acts of the plaintiff or his tenants in casting filthy water on the defendant's premises, did have the effect to stop some of the surface water from running off the plaintiff's land upon that of the defendant, the defendant would not be liable therefor.

This is complained of by the plaintiff. In his view the defendant must forego all right to protect himself from the plaintiff's unlawful act, and seek such redress as he could get by litigation, unless he could use the means of prevention in such manner, as to work no incidental harm to the plaintiff. We know of no such rule of law or right. If the plaintiff or his tenants violated the defendant's rights by turning filthy water on his premises and spoiling his well, the defendant had the right by law in a peaceable way to prevent it, and save himself from harm if he could, and to use the necessary means to that end.

If such means produced some incidental hurt or damage to the plaintiff he has no right to complain. It cannot be made chargeable to the defendant, whose act was rightful; it is really caused by his own wrongful act, which made that of the defendant necessary.

The judgment is affirmed.

Amos S. Little *v.* George Sleeper.*

Levy of Execution. Record.

The record, in the town clerk's office, of an execution levied upon real estate, and the return thereon, is to be made within the life of the execution and before the return, and if not so made the levy is void.

Ejectment for lands in Bradford. Plea, the general issue. Trial by jury, January Term, 1863, Peck, J., presiding.

The defendant's title depended upon the validity of the levy of an execution issued upon said lands upon a judgment rendered in favor of the defendant against G. and E. Prichard, June 25th, 1860, for $2065.08, damages, and $5.44, costs.

The defendant offered in evidence copies of the writ in that case, the officer's return, judgment, execution, levy, and certificate of the town clerk of receipt and record of said execution, and the justice's certificate of record, all of which were objected to by the plaintiff, first upon the ground that they did not show that the execution and officer's return thereon, was recorded in the town clerk's office within the life of the execution. Second, that the levy by the officer was illegal and void.

The court ruled, contrary to the claim of the defendant, that the clerk's certificate upon the justice's copy of said levy, was not *prima facie* evidence to show that the execution was actually recorded in the town clerk's office within the life of the execution, to which the defendant excepted. The court also overruled the second objection, to which the plaintiff excepted.

The facts established by the evidence are sufficiently set forth in the opinion of the court.

The court instructed the jury that if from the whole evidence they found that the execution was actually recorded in the town clerk's office within the life of the execution, the levy of the defendant was good and valid, and the defendant would be entitled to a verdict, otherwise they would find a verdict for the plaintiff. To this charge the defendant excepted. Verdict for the plaintiff,—exceptions by the defendant.

*This case was heard March Term, 1863, and decided March Term, 1864.

C. W. Clark, for the defendant, maintained that if the execution was returned to the justice and there recorded within its life, and also returned to the town clerk's office and there filed for record within its life, and there remained on file until it was actually recorded, it was sufficient to render the levy valid. C. S. 313, § 26; *Willard* v. *Lull*, 20 Vt. 373; *McGregor* v. *Brown*, 5 Pick. 171; *McLellan* v. *Whitney*, 15 Mass. 137.

R. McK. Ormsby, for the plaintiff.

PIERPOINT, J. The principal question in this case is as to the validity of the levy of the defendant's execution, upon the land in controversy. The exceptions show that the officer levied the execution upon the land, took it with his return thereon to the town clerk's office, and the town clerk made a certificate upon it, that he had received it for record, but did not then record it. The officer thereupon took the execution from the town clerk's office, and returned it to the office of the justice who issued it, and the justice subsequently recorded it. The said officer afterwards and within the life of the execution, took it from the office of the justice and carried it to the town clerk's office and left it there to be recorded. The town clerk put it on file and subsequently recorded it; but the jury have found under the charge of the court that the town clerk did not record it until after the return day had passed.

These facts present the simple question whether it is necessary to the validity of the levy of an execution that the execution and the officer's return thereon, should be recorded in the town clerk's office, within the life of the execution. The language of the statute is that "all executions, extended and levied upon real estate, with the return of the officer thereon, being recorded in the office wherein deeds of such real estate are required by law to be recorded, and also returned into the office of the clerk of the court, or justice from whom such execution issued, and there recorded, shall as against the debtor," &c.

It has long been settled in this state that all that the statute requires the officer making a levy to do, or cause to be done, to make such levy valid, must be done, and the execution and his return thereon returned to the authority issuing it within the life of the execution. This principle is recognized in *Hall* v. *Hall*, 5 Vt. 304;

Downer v. *Hazen*, 10 Vt. 418; *Morton* v. *Edwin*, 19 Vt. 77; *Russell* v. *Brooks*, 27 Vt. 640; and *Perrin* v. *Reed*, 33 Vt. 62.

Is the recording of the execution and the proceedings thereon, an act that the officer should cause to be done before he returns the execution? The language of the act clearly indicates that it is; the words "being recorded in the office wherein deeds of such real estate are by law required to be recorded, and also returned into the office of the clerk of the court or justice," &c., will hardly admit of any other construction than that the record in the town clerk's office is to precede the return, and if so then it must be the duty of the officer to cause it to be done, as there is no other person that has any authority in the matter. Again, the record in the town clerk's office *must* precede the return, as after the return the execution and the return thereon become a part of the files of the court, and should there remain and be recorded. The power of the officer over the execution is at an end. Neither he, nor any other person, has a *right* to take the execution from the files, for the purpose of having it and the return thereon recorded in the town clerk's office, or for any other purpose.

It would seem to have been the intention of the legislature, in framing the several enactments on this subject, that, when a levy is completed and the execution returned, the records in the town clerk's office should show precisely what had been done, changing or affecting the title, so that all might have notice thereof, either actual or constructive.

In *Perrin* v. *Reed* this court held that it was not necessary that the execution and officer's return thereon should be recorded in the office of the clerk or magistrate who issued the execution, within the life of the execution, but the principle is fully recognized in that case, that the record in the town clerk's office is to be made within the life of the execution, and before the return thereof; and although this point did not arise in that case, the reasoning of the learned judge on the subject is sound and satisfactory. The distinction that exists between the recording of the proceeding, in the town clerk's office, and in the office of the court issuing the execution, is clearly presented; in the latter case the causing of the record to be made is no part of the duty of the officer; it must necessarily be made after the return of the execution, and as the officer has the entire life of the execu-

tion to make his return in, it follows that in some cases, if the record is made at all in the office from which it issued, it must be made after the life of the execution has expired. The statute indicates no time within which this record is to be made, but we think the statute, in the case of the record in the town clerk's office, as well as the nature and form of the whole proceding, and the reason on which the requirement is based, all indicate most clearly that the record is to be made within the life of the execution and before the return, and if not so made the levy is void.

Judgment of the county court affirmed.

CHESTER B. DOW *v.* JOSEPH H. WORTHEN.

Statute of Frauds. Agency.

D. sold to H. a quantity of apples, and sent several barrels more than H. agreed to take, with notice that what H. could not sell, D. would take back. H. afterwards concluded to take all that D. had sent. They then agreed upon the price of the whole, before unsettled, at $75., and that this sum should remain in the hands of H. as part payment for a lot of poultry which D. was then negotiating to purchase, and finally did purchase of H. *Held*, that the contract for the poultry was binding within the statute of frauds.

Where an agent becomes personally responsible for goods purchased for his principal, the latter cannot claim that their relations as principal and agent are changed thereby.

ASSUMPSIT for not receiving a lot of poultry which the plaintiff purchased for the defendant as his agent. Plea, the general issue. Trial by jury, June Term, 1863, PECK, J., presiding. The plaintiff gave evidence tending to show that about December 1st, 1861, he was employed by the defendant to purchase a lot of poultry of Hatch & Co. of Strafford, Vt., at certain prices named, if it could not be obtained at less rates; that after looking at the poultry twice he effected a purchase of it as directed; that its quality was as good as he represented it to be; that the bargain was made on Saturday and the poultry was to be moved away on the following Tuesday and Wednesday; that the bargain was evidenced by no writing, no part

of the poultry was delivered, and nothing was given as earnest, except as herein-after stated.

Said Hatch testified that previous to this bargain he agreed to take ten or twelve barrels of apples of the plaintiff, but the plaintiff sent him twenty barrels, with word that what he could not sell, he would take back; that previous to said first of December, Hatch had sold so many of these apples, that he had concluded to keep the whole twenty barrels; that on the occasion of the plaintiff's looking at the poultry the first time, he told the plaintiff he would take the whole of the apples, and pay him for both what he had sold, and what he had on hand unsold, and that the plaintiff said he need not do so then; that if he should buy the poultry it would be so much paid; that at the time of closing the poultry trade, on Saturday, it was agreed between Hatch and the plaintiff that the account of the plaintiff against Hatch for said apples should apply towards the poultry; that the price was then agreed upon for the apples at $75., and that this was then agreed on as a part payment of the poultry. The plaintiff testified on this point to the same in substance.

Hatch also testified that the plaintiff told him at the time of the trade, that he was purchasing the poultry for the defendant, but that he told the plaintiff that he did not know the defendant, and would look to nobody but the plaintiff, and that it was agreed between them that the plaintiff was to be the person responsible to Hatch & Co. in the contract.

The plaintiff also gave evidence tending to show that he wrote to the defendant on Monday after the trade, informing him of his purchase; that on the day of his trade with Hatch, the weather became warm, and that it continued to thaw until the following Wednesday, and that on Tuesday he received orders by letter from the defendant not to move the poultry during the warm weather; that said poultry remained in Hatch's store until the 18th of December, when, at the request of the plaintiff, the defendant went to Strafford, and saw it, and then refused to take it; that the plaintiff thereupon took it to Boston, and sold it at a loss of $39.62, from the contract price; that the plaintiff never knew or heard that the defendant was purchasing for the Barrons, or any other party, but supposed he was buying on

his own account, until sometime after he, the plaintiff, purchased the poultry.

The defendant gave evidence tending to show that during the last ten years he had been in the employ of Messrs. A. T. & O. S. Barron, of Quechee Village, as agent for the purchase of poultry in a certain district assigned him, including the town of Strafford, and that he acted as such agent of the Barrons in employing the plaintiff, and told the plaintiff so at the time.

There was no evidence in the case tending to show that the defendant in employing the plaintiff to buy poultry, or to buy this poultry, said anything indicating that he was not acting on his own responsibility, except that he told the plaintiff that he was buying it for the Barrons.

Asa T. Barron, of the firm of A. T. & O. S. Barron, was introduced as a witness by the defendant, who testified in substance that they employed several agents to purchase poultry, and assigned each a district, and then would not themselves or by other agents purchase any in that district, and it was understood that if their agents employed sub-agents, they, the Barrons, would not be liable to or responsible for such sub-agents.

The defendant also gave evidence tending to show that this poultry was not so good as the plaintiff represented it to be, or as he, the defendant, instructed him to buy,—which was denied by the plaintiff.

The defendant requested the court to charge the jury that the contract made by the plaintiff with Hatch for the poultry was void under the statute of frauds; that the agreement to apply the debt due from Hatch to Dow was not such part payment of the price as would answer the provisions of the statute.

The court refused to charge the jury as requested, but charged that if they found the facts in relation to the apples, and the agreement applying the $75. in part payment for the poultry, as stated by Hatch and the plaintiff in their testimony, it was such a part payment as constituted a sufficient compliance with the statute of frauds, provided they found that by the agreement it was treated and understood by the parties at the time of the trade, as a then present payment, but unless they so found, then the contract between Hatch & Co. and

the plaintiff was not legally binding, and the plaintiff could not recover,—to which the defendant excepted.

The court also told the jury that if they found the facts as testified to by Asa T. Barron, in relation to the defendant's agency, then the evidence tending to show that the plaintiff knew that the defendant was buying poultry for the Barrons, and the evidence as to what the defendant told the plaintiff as to the purchasing of this poultry for the Barrons, would not have the effect to shield the defendant from personal liability in this action,—to which the defendant excepted.

In relation to the question whether the defendant was justified in refusing to take the poultry, on account of the alleged defects in its quality, the court told the jury among other things, that the rule applicable to principal and agent was applicable to this case; that the plaintiff was bound to possess reasonable judgment and skill in the business he undertook, and such skill and judgment as the defendant had reason when he employed him, to suppose he possessed; that if the plaintiff fully and properly exercised it, and in good faith supposed the poultry answered the description of poultry the plaintiff instructed him to buy, and the representations he had made of it, and he made these representations believing them to be true, the defendant would not be justified in refusing to take it, merely because it was not quite up to the standard in quality of that which the defendant told him to buy; but that it might be so inferior as to warrant the jury in coming to the conclusion, that the plaintiff did not possess the requisite skill and judgment, or that he acted in bad faith or negligently, and without sufficient examination and care, and if so, the defendant was not bound to accept it. To this portion of the charge the defendant excepted.

S. M. Gleason and *C. W. Clark*, for the defendant, cited Brown on Frauds, § 341; *Smith* v. *Surnam*, 6 B. & C. 561; *Archer* v. *Zeh*, 5 Hill, 200; *Walker* v. *Mussey*, 16 M. & W. 302; *Gilman* v. *Hill*, 36 N. H. 11; Chitty on Cont. 349; 2 Pars. on Cont. 333.

D. C. Denison, for the plaintiff, cited *Green* v. *Merriam*, 28 Vt. 801; *Kittredge* v. *Sumner*, 11 Pick. 50; Chitty on Cont. pp. 376, 396, 397; 1 Smith's Lead. Cas. 377 and 334; Story on Agency, §§ 182, 183, 186.

ALDIS, J. 1. The part payment required by the statute of frauds, in order to make the contract for the sale of goods of the value of over $40. binding on the parties, does not require the actual passing of *money* from the vendee to the vendor. But it must be of *value*—money's worth—and it must be agreed by both parties at the time that the value is then actually passed from the vendee to the vendor —that it is a then present payment. It is not enough for the parties to agree that it *shall be* applied as payment. That would be merely an agreement to pay. It must not rest in agreement,—it must be *pay down*. The payment must be actually made and both parties must so understand it;—the vendee that he pays and the vendor that he receives the value, and thus that the title to the value has passed from the vendee to the vendor.

In *Walker* v. *Mussey*, 16 Mees. & Wels. 302, it was verbally agreed that the debt that the vendee owed the vendor of four pounds "should go in part payment" to the vendor for the leather. This was an *agreement* to apply the amount in payment—but it was not payment. As Parke, Baron, says, "no evidence was given of the actual payment or discharge of the debt—all rested in agreement merely. If the contract had been that the parties were to be put in the same situation at that time as if the plaintiff's debt to the defendant had then been paid, the statute might have been satisfied without any money having passed in fact."

Archer v. *Zeh*, 5 Hill, 200, stands on the same ground. Zeh agreed he would credit or indorse on the note the amount Archer would promise to pay; but the court held this did not extinguish the debt from McDuffie to Zeh and was not a payment, or an agreement for absolute credit. Judge COWEN'S remark that "even if there had been an agreement for absolute credit, I should doubt whether the statute would be satisfied without something more," was not the statement of the principle of the decision, and must be regarded only as the expression of a doubt by that learned judge. There is nothing in Browne on the statute of Frauds, chap. 16, p. 357, inconsistent with the doctrine which we have here suggested as the true rule of the law.

The statute only requires actual part payment. It does not require that such payment shall be shown by writing—by an indorsement, a

credit or a receipt, or by the manual delivery of any article or property of value. It leaves the parties to prove payment by such proof as they may have;—but it does require proof of *payment*, and not of a mere *agreement to pay* or to apply in payment.

Applying this principle to this case we find no error in the decisions of the county court. The evidence clearly tended to prove actual part payment at the time the contract for the poultry was made. The case shows that both parties "treated the $75. as so much *already* paid upon the price of the poultry—that this was then agreed on as a part payment of the poultry." And the court held and so charged that the jury must find that both parties then agreed and treated the $75. "*as a then present payment.*" If this was found then Hatch & Co.'s liability to the plaintiff for the $75. was extinguished—paid. If Hatch & Co. had refused to deliver the poultry the plaintiff could not have sued them on the contract for the apples to recover the $75.;—but only for the $75. as money paid on the contract for the poultry.

But we do not consider it necessary, even in deciding this case, to hold that a mere antecedent debt agreed to be paid and extinguished at the time and so actually paid, would be part payment so as to satisfy the statute, in the entire absence of any act done to evidence the fact of payment, such as an endorsement, a credit, a receipt,—a giving up of the evidence of the debt. For here the parties settled their unsettled dealings about the apples; the plaintiff sold those on hand to Hatch & Co.; they agreed upon the price of the whole, (before unsettled,) at $75., and agreed that this should remain in the hands of Hatch & Co. as payment for the poultry. This was something more than a mere agreement as to an antecedent debt—it was a settlement and actual transfer of the title of property already delivered. This in the judgment of a part of the court is an important element in the case, and sufficient alone to determine it.

2. The plaintiff was merely the defendant's agent in buying the poultry, and was bound only to the duty and liability of an agent. The rule on this point we think was very clearly and properly laid down by the judge in his charge.

The fact that the agent saw fit to become responsible to Hatch & Co. for the amount of the purchase—they being unwilling to trust

his principal—does not change the relation of the parties. The act in no way interfered with or impaired the principal's rights. So long as the agent did not see fit to make any claim upon the ground that he had become responsible for the price, but still recognized his agency notwithstanding he had thus become liable, it was not for the defendant to claim that such a voluntary favor for his benefit should change their relation and make the plaintiff a purchaser from Hatch & Co., and a vendor to him.

The judgment is affirmed.

Asa B. Viall *v.* Harvey B. Hubbard.

Contract. Variance.

By the contract the plaintiff was to furnish a monument of "good white marble." He did furnish a monument of which the material was "good white marble," but it had a discoloration on it, gotten there by accident, but temporary in character, and by lapse of time and by exposure to the open air and frost would disappear. *Held*, that the contract was not complied with, and the plaintiff was justified in refusing to accept the monument.

The substitution of "Octavia J." for "Octavia Jane," was also a substantial defect, although made by the marble worker in good faith, believing the inscription as he made it would look better and be more satisfactory.

The facts reported do not constitute an acceptance of the monument.

Book Account. The auditor reported that the plaintiff's account consisted of one item of $25. for a marble scroll.

It appeared that the defendant and his wife called at the plaintiff's shop to purchase a grave stone or monument for their daughter, a girl of about seven years of age, who had recently died. At that time there was a marble stone in the shop called a scroll, finished for another man, and which the defendant was, to some extent, satisfied with, and directed to have his finished like it. It also appeared that the defendant directed the plaintiff to make it of good white marble, and that he expressed a good deal of anxiety to have it a good one. The price agreed upon was $25. The scroll was completed ready to be set within the time when by the contract of the parties it was to

be done, and the plaintiff offered to take it to the grave and set it, but the defendant refused to accept the scroll and forbid his setting it, for the alleged reason that it was not made according to the contract.

The auditor found that the stone was of as good a quality as the plaintiff contracted to furnish, unless a stain or discoloration on the lower part of it should make it otherwise. There was a blemish upon it, on which a part of the letters of the inscription were cut, which appeared to have been caused by the stone, before being wrought, lying upon some substance which colored it, and which, to some extent, disfigured it. This color was upon the surface, and the auditor found that it would disappear after the stone had been set in the open air, and exposed to the frost; and that therefore, there was no failure on the part of the plaintiff in fulfilling his contract in this respect, unless, as matter of law, the temporary discoloration of the stone, and the consequent temporary disfiguration was a failure.

The name of the girl for whom the stone was designed was *Octavia Jane*, and, at the time of contracting for the stone, the plaintiff was directed to put that name upon the shield, or raised place, in the stone; but upon working and finishing the stone, it was found that there was not room enough for the whole of both names, without putting one name over the other, and the plaintiff therefore inscribed the name "Octavia J." instead of "Octavia Jane."

The plaintiff in making this variation acted in good faith, believing that the inscription as he made it would look better and be more satisfactory than with both names at length, and one over the other. The contract was made in November, and the next spring, after the stone was finished, the defendant sent his wife to see the stone, and to see whether it was satisfactory, and at this time, the subject of the manner of putting on the name was talked about, and the plaintiff then explained to her the reason why he had put on "Octavia J." instead of "Octavia Jane," and she then expressed herself satisfied with it as it was. This was about the 2d day of May, 1863.

The full name, "Octavia Jane," did appear upon the other side of the stone, where also appeared the names of the defendant and his wife, as the parents of the said "Octavia Jane."

There was also some talk on this occasion about having a wreath or sprig under the name, but it was finally decided not to have it.

The plaintiff then offered to set the stone, but Mrs. Hubbard chose not to have it done until her husband could come and see to it.

The plaintiff claimed that the stone after it was finished was accepted by the wife of the defendant, who was sent there by the defendant, and who acted as his agent.

Before leaving the shop on the said 2d day of May, Mrs. Hubbard informed the plaintiff that she had the money to pay him, and offered to pay him a part of it, but the plaintiff said it would be be just as well to wait and pay it all together, and upon that she left and returned home.

On the 27th day of May the defendant came to the plaintiff's shop, and saw the stone, and expressed himself dissatisfied with it, and refused to take it, and the stone still remains in the plaintiff's shop, where it was when the wife of the defendant saw it on the 2d day of May, and has not been paid for.

The court rendered judgment on the auditor's report for the plaintiff,—to which the defendant excepted.

W. C. French, for the defendant.

I. The "*discoloration*" upon the stone is such an imperfection as will excuse the defendant from taking it.

II. The stone was not finished according to the contract, in omitting the word "Jane" upon the shield.

III. This action of book account cannot be maintained. The plaintiff was to *make and set* the stone. He *made it, but the defendant declined to accept it and it has always remained in the plaintiff's shop.* The contract is still *executory*. *Read* v. *Barlow*, 1 Aik. 145; 1 Vt. 97; *Bundy et al* v. *Ayer*, 18 Vt. 497.

Hutchinson & Rowell, for the plaintiff.

The stone after it was finished was accepted by the wife of the defendant, when sent there by the defendant, acting as his agent, and she expressed herself satisfied with the stone and offered to pay a part of the price, on the 2d day of May, 1863.

The acts of the wife are binding on the husband, so far as she acts as his agent. *Gray* v. *Otis*, 11 Vt. 628.

This is in reality a charge for materials furnished and labor performed by the plaintiff, at the special instance and request of the defendant, and differs from the mere sale of goods already finished and

on hand. Again, we claim a distinction in cases where the produce of the plaintiff's labor could or could not be returned to him. In a case like the present, to hold that the defendant is not liable, would be to enable him to practice a fraud on the plaintiff, leaving the property on his hands, of no value to any one but the defendant. One promise should be held a good consideration for another, and we think we have a right to rely upon *Mattison* v. *Wescott*, 13 Vt. 258; *Downer* v. *Sinclair et al.*, 15 Vt. 495; Addison on Contracts, p. 243.

Book account is the proper form of action. The title to the scroll passed to the defendant. *Mattison* v. *Wescott*, 13 Vt. 258; *Carpenter* v. *Dole*, 13 Vt. 578; *Paddock et al.* v. *Ames*, 14 Vt. 515; *Bundy et al.* v. *Ayer*, 18 Vt. 497; Addison on Contracts, 221; *Hinde* v. *Whitehouse*, 7 East, 558; *Carruthers* v. *Payne*, 2 M. and P. 441; *Wilkins* v. *Bromhead*, 46 Eng. Com. L. 962.

There was a sufficient delivery. *Chamberlian et al.* v. *Farr*, 23 Vt. 265; *Jewett* v. *Warren*, 12 Mass. 300; 2 Kent's Com. 500.

ALDIS, J. By the contract the plaintiff was to furnish a monument of "good white marble." He did furnish a monument of which the material was "good white marble,"—but it had a blemish, "a discoloration" on it, across which a part of the inscription was wrought. The auditor finds that this stain was not naturally in the marble—had gotten upon it by some accident—was temporary, and by lapse of time and exposure to the open air and frost would disappear. The plaintiff claims that such a discoloration is not a variance from the contract—that he has substantially furnished just such a monument as he agreed to, and can recover the price. The defendant insists that such a stone is not a compliance with the contract and that he was justified in refusing to accept it.

We think the discoloration a material defect, and the defendant fully justified, for that reason, in refusing to accept the monument.

He was entitled to "good white marble,"—not to "good white marble with a stain on it;" and he was entitled to such a monument at the time of delivery. He was not bound to wait an indefinite period for the air and the frost to bleach the stained spot. He had a right to just such an article as he bargained for at the time he was to receive and pay for it.

There is no kind of a contract in which the purchaser has the

right to have his wishes and instructions more strictly and literally observed than this of the manufacture and erection of a monument to the departed. It is not a matter of trade and profit—nor of taste alone. It is a matter of sentiment and feeling. Such a monument embodies the love and tenderness of the parents toward their deceased child. It is a memorial to perpetuate the purity, the goodness, the virtues of the departed; sometimes to recall tender associations and cherished recollections known only to the survivors; sometimes to conform to the expressed wishes of the deceased—a sacred obligation; sometimes an emblem of the deceased person's character and hope of immortality. To erect such a memorial is always the last office of affection,—all that is left for the parent to do, and all that he can do (however inadequate it may seem) to show his love for and to preserve the memory of his deceased child. These natural sentiments of the heart are to be religiously respected. The wishes and directions of the parent have their sources in sentiments that can stand no questioning from others, and are not to be discussed. "A stranger intermeddleth not therewith."

In the case at bar the parents may well have felt that pure white marble was the only appropriate emblem for the spotless purity of their departed child. Discolor it—stain it with a blemish, and the whole meaning of the memorial for them is destroyed. They would feel it a wrong to the memory of their child to erect such a monument.

So, too, in regard to the name—the substitution of "Octavia J." for "Octavia Jane" we deem a substantial defect. The familliar name of the child,—that used in the family, and endeared by many recollections was not there. The parents had the right to have the inscriptions sculptured on the marble literally and exactly as they had directed, and as the plaintiff had agreed.

For such defects it is no answer to say, as the auditor finds—that the marble-worker acted in good faith—that he believed the inscription as he made it would look better, and be more satisfactory. It was his simple duty, where the instructions were exact and specific, to follow them.

It is claimed that the defendant, by his wife, accepted the monument. If so, he should pay for it. But the auditor does not so

find the fact. Some of the facts reported strongly tend to show an acceptance—some the contrary. If the facts reported amounted in law to an acceptance we should so treat it, though not expressly so found by the auditor. But taken all together they do not. The report gives us a lively picture of a lady much perplexed between her own wishes drawing her in one direction, and the solicitations and arguments of others by whom she was surrounded impelling her in the other. The result of the whole seems to have been, that she got away from the discussion, substantially deferring a decision till her husband could come and see the work.

As this decision settles the controversy upon its merits, we need not consider the question as to the form of action.

Judgment reversed, and judgment for the defendant for his costs.

PELATIAH CORLISS, JONAS W. CLARK, AND ORLANDO FULLER v. ALONZO W. PUTNAM.

Contract. Practice. Supreme Court.

The plaintiff took one hundred sheep of the defendant in May to pasture through the season, the defendant at the time of the bargain saying that he wanted to fatten the sheep for the market in the fall, and the plaintiff that he had sufficient pasturage to keep one hundred and fifty sheep, but would take none but these, and would keep them as such sheep ought to be kept. In September the defendant ascertaining that the pasture was wholly insufficient, and that the sheep were growing poor, took them away. *Held*, that the plaintiff having failed to perform the contract on his part could not recover on the contract for the keeping of the sheep, but the defendant had the right to terminate the contract and take the sheep away.

Held also, that the finding of the auditor that the sheep were not worth as much, in consequence of the plaintiff's failure to perform the contract as they would have been if he had performed it, by more than the contract price of keeping, was conclusive that the plaintiff could not recover upon any principle.

Where the county court has rendered judgment on an auditor's report, the supreme court will not presume that the county court found any facts besides those reported, except such as are fairly to be inferred from the report itself, as decided in *Pratt* v. *Page et al.*, 32 Vt. 13.

BOOK ACCOUNT to recover for pasturing one hundred sheep through the season of 1856. It appeared from the auditor's report that the

plaintiffs Corliss and Clark, being owners in common of a farm in Bradford, leased the same to the plaintiff Fuller in the spring of 1856, at the halves, and that the said Fuller made the agreement with the defendant to pasture said sheep. The other material facts found by the auditor are set forth in the opinion. The defendant insisted before the auditor that the action could not be sustained by these plaintiffs jointly, and the auditor so decided. Upon the facts found by the auditor in his report, the court at the June Term, 1863, PECK, J., presiding, rendered judgment for the plaintiffs,—to which the defendant excepted.

A. M. Dickey and *C. W. Clarke*, for the defendant, maintained that upon the facts found by the auditor the defendant is entitled to recoupe or offset his damage to the amount of the plaintiffs' claim, and cited *Dyer* v. *Jones*, 8 Vt. 205; *Goslin* v. *Hodson*, 24 Vt. 140; *Merrow* v. *Huntoon*, 25 Vt. 9; *Hurlbut* v. *Chittenden*, 26 Vt. 52; *Patrick* v. *Putnam*, 27 Vt. 759; *Hubbard* v. *Belden*, 27 Vt. 645; *Bellows* v. *Bingham*, 28 Vt. 243.

This suit should have been in the name of Fuller alone. *Hurd* v. *Darling*, 16 Vt. 377.

The defendant was right in taking the sheep away when he found the pasturage insufficient.

Batchelder & Ormsby, for the plaintiffs, maintained that the judgment of the county court is conclusive in respect to the question of joinder of the plaintiffs, and cited *Birchard & Moulton* v. *Palmer*, 18 Vt. 203; *Wills et al.* v. *Judd*, 26 Vt. 617; *Harrington* v. *Edson*, 24 Vt. 555; *Abbott* v. *Camp*, 23 Vt. 650. If the pasture failed in consequence of a drought, it was an act of God that the plaintiffs were not bound to anticipate in making the contract.

PIERPOINT, J. We think that upon the facts as found and reported by the auditor the defendant was clearly entitled to a judgment, and that the county court erred in rendering a judgment thereon for the plaintiff.

It appears that the defendant agreed with Fuller, one of the plaintiffs, to pasture for him (the defendant) one hundred sheep, through the season of 1856. The defendant at the time of the bargain told the said Fuller that he wanted to fatten the sheep, or a portion of them for market in the fall. The said Fuller then represented to the

defendant that he had spare pasturage sufficient to keep 150 sheep, but that he would only take in the said 100 sheep, and agreed to keep them as such sheep ought to be kept. The sheep were taken by the said Fuller, put into his pasture in May, and were kept until the 3d of September following, when the defendant ascertained that the pasture where the sheep were kept was wholly insufficient to furnish the necessary amount of sustenance for the sheep, that the feed was very short, and that the sheep were growing poor, with the prospect that if they remained there they would continue to grow poor. The defendant for these reasons took the sheep away.

These facts show a complete failure on the part of Fuller to perform the contract, and one that fully justified the defendant in putting an end to it and taking the sheep away. This being so the plaintiffs cannot recover upon the contract. If they can recover at all it must be upon a *quantum meruit*, for the amount that the defendant was benefited by the pasturing of his sheep. And here again the report of the auditor seems to be entirely conclusive, for he finds, that instead of the defendant's being benefited, the sheep were not worth as much, in consequence of the plaintiffs' failure to perform the contract, as they would have been if the plaintiffs had performed it, by more than the contract price of keeping. Such being the fact, it is quite clear that the plaintiffs cannot recover upon any principle.

It is said on behalf of the plaintiffs that the defendant should have let the sheep remain until the close of the season, as they might improve. The auditor has found that the probability was, that they would grow poorer instead of improving. The defendant was under no obligation to take the chance. The plaintiffs having failed to perform the agreement on their part, the defendant had the right to terminate it and take away the sheep.

Again it is urged, that as the county court rendered judgment for the plaintiffs, this court will presume that the county court drew such inferences from the facts reported as would sustain their judgment.

This court will not presume that the county court found any facts besides those reported, except such as are fairly to be inferred from

the report itself. This was decided in *Pratt* v. *Page et al.*, 32 Vt. 13.

In this case it is difficult to see what inferences can be drawn from the report that will sustain a judgment for the plaintiffs that will not be in direct conflict with the facts found.

Judgment reversed and judgment rendered for the defendant.

The State of Vermont v. George Sleeper, and The State of Vermont v. Moses H. Magoon.

Indictment. Perjury. Pleading.

An indictment for perjury alleged that "Eliza E. Carpenter, on the 25th June, 1860, brought a petition of divorce, addressed to the supreme court then next to be held," &c., "setting forth in said petition," &c., and then states the substance and prayer of the petition for a divorce, alimony and the custody of the child. It then proceeded as follows: "whereupon it became necessary to take the testimony of witnesses in the premises," and then states that the respondent "appeared before Henry N. Worthen, a notary public, and made his deposition as to facts in the premises," &c. *Held*, that the indictment sufficiently connected the false evidence with the petition, and that the words "brought a petition of divorce to the supreme court," or "petitioned the supreme court," sufficiently averred the pendency of the suit in court to make it a judicial proceeding.

And the indictment also averred,—"it became and was material to show whether the said Sleeper was at the house of L. D. Carpenter on the morning of the second of November, A. D. 1859, and whether he then had a conversation with said Carpenter, in the presence of certain other persons," and then proceeded to allege that the respondent "falsely, corruptly and wilfully" swore "that on the morning of Nov. 2d, 1859, he stopped at said Carpenter's house and had conversation with Carpenter in the presence of one Magoon and the said Eliza E. Carpenter," &c. *Held*, that it was sufficiently alleged that this evidence was material. It need not appear in addition how it was material.

The allegation that the respondent "falsely, corruptly and wilfully" swore is sufficient without the word "knowingly."

Indictment for perjury in two cases, involving the same questions, and heard together. The respondents filed general demurrers to the indictments.

The indictments are sufficiently set forth in the opinion of the court.

At the January Term, 1863, the court, Peck, J., presiding, over-

ruled the demurrers, and adjudged the indictments sufficient,—to which decision the respondents excepted.

A. M. Dickey and *C. W. Clarke*, for the respondents.

I. It does not appear by these indictments that the evidence given by the respondents, and upon which perjury is assigned, was given or taken to be used in any *judicial proceeding then pending.* This is matter of substance, and should distinctly appear, stated with the highest degree of certainty. *State* v. *Chamberlin*, 30 Vt. 559; 1 Chitty's Crim. Law, 172; 3 Arch. Crim. Prac. and Pl. 591–2–3; *Queen* v. *Overton*, 4 Ad. & El. N. S. 83, (45 E. C. L. 83); *Regina* v. *Bishop*, 1 C. & M. 302, (41 E. C. L. 169); *Regina* v. *Pearson*, 8 C. & P. 119, (34 E. C. L. 643).

In the case of Sleeper, the indictment alleges that "*Eliza E. Carpenter, of, &c., brought a petition of divorce, addressed to the supreme court, &c.*" The phraseology made use of in the case of Magoon is that "*Eliza E. Carpenter, of, &c., petitioned the supreme court next, &c., setting forth, &c.*"

These words are not sufficient to constitute a distinct and positive averment, that at the time of the taking of the depositions of these respondents, there was duly and legally pending in the supreme court a libel for divorce, in which Eliza E. Carpenter was libellant and Lorenzo D. Carpenter was libellee.

"An indictment must be good without the help of argument or inference."

The want of a distinct averment that the libelee had been summoned in due form to answer to the libel, and that the same was then pending, renders nugatory the statement which follows, that "*it became necessary to take the testimony of witnesses in the premises.*"

II. It does not appear by either of these indictments in what cause, proceeding or trial, or whether in any, it became material to show "*whether said Sleeper was at the house of said Carpenter on the 2d day of November*, 1859, *and whether he there had any conversation with said Carpenter in the presence of certain other persons.*" The indictments only say that "*it became and was material to show whether,*" &c. They should aver that it was material to the trial of said libel for divorce. All the precedents are so. 2 Chitty's Crim. Law. 350, *et seq.*; 3 Arch. Crim. Prac. & Pl. 598; *Commonwealth* v. *Knight*,

12 Mass. 274; *Rex* v. *Goodfellow*, 1 C. & M. 569, (41 E. C. L. 311); *Rex* v. *Bartholomew*, 1 C. & K. 366, (47 E. C. L. 367); *Rex v. Hewins*, 9 C. & P. 786, (38 E. C. L. 455).

What is intended here as an averment of materiality is of no avail for that purpose, because it does not connect the evidence with any judicial proceeding; but it must control the question as to what part of the evidence stated perjury is attempted to be assigned.

Perjury may be committed in giving evidence material to a collateral issue, but in that case the indictment must show how that issue became material, as well as how the evidence became material to that. *Commonwealth* v. *Knight*, 12 Mass. 274.

John Rowell, state's attorney, for the prosecution, cited C. S. 554, § 6; 2 Chitty's Crim. Law, 385, precedent, and 306–7; Wharton's Crim Law, § 2263, and cases cited; Wharton's Precedents, (577,) note "e."

ALDIS, J. These two cases were heard together at the last term, and stand upon the same ground.

They are indictments for perjury. To sustain the demurrer, the respondents claim, 1st, that the alleged perjury does not appear to have been committed in any judicial proceeding, and 2d, that it is not alleged and does not appear that the false evidence was material to the issue.

First—is it alleged with sufficient certainty that the false evidence was given in a judicial proceeding?

The indictment says that "Eliza E. Carpenter, on the 25th June, 1860, brought a petition of divorce addressed to the supreme court then next to be held," &c., "stating in her petition," &c., and then states the substance and prayer of the petition for divorce, alimony and the custody of the child. It then proceeds as follows: "whereupon it became necessary to take the testimony of witnesses in the premises," and then states that the respondents "appeared before Henry M. Worthen, a notary public, and made his deposition as to facts in the premises," &c.

The notary public had power to take the depositions in the case if the petition for divorce had been signed by the petitioner, and, with a summons signed by the clerk, had been served on the petionee, or if other legal notice thereof pursuant to our statute had been given.

It is claimed that the indictment does not aver any such service, and without such averment is bad.

The words "brought her petition to the supreme court," it is admitted, express the idea of having made and signed the petition; but it is agreed that they do not convey any idea of service of it. If it were not for the decision in *State* v. *Chamberlin*, 30 Vt. 559, we should have much doubt whether the allegations in this indictment are sufficient to satisfy the strictness of the rule. But we think that case is substantially like this and must govern it. There the words were, "*exhibited* his certain bill of complaint in the court of chancery." We do not think the word "exhibit" has any technical legal meaning beyond the words "bring," "prefer," "petition.'. They all convey the idea of commencing a proceeding in court.

In chancery the statute provides that the time of signing the subpœna or summons shall be deemed to be the time when the bill is filed. In cases of divorce, when the petition has been signed, and the summons to the libellee to appear and answer has also been signed and issued by the clerk, then we think the case must be deemed as pending in court. The court will not act till due service has been made or notice given, and would doubtless reject depositions taken before such service or notice. But cases are often entered in court and continued for notice by publication, where the order for publication has not properly been complied with. Their pendency is determined by the actual issuing of the citation or summons by the clerk.

It is said that in *State* v. *Chamberlin*, there was this further allegation—"as by the orator's bill of complaint remaining filed of record in the court of chancery will appear." But this allegation adds nothing to the former one—"exhibited his bill in the court of chancery." By our statute a bill in chancery is deemed to be filed when the subpœna is signed by the clerk. It is further urged by the respondents that the words "whereupon it became necessary to take the depositions of witnesses in the premises," add nothing to the former one as showing the pendency of a suit in court, and does not sufficiently connect the alleged perjury with the petition. We think, however, that the words "in the premises" refer to the libel, and the whole expression is equivalent to this—"whereupon it became ne-

cessary to take the depositions of witnesses to prove the facts stated in the petition of the said Eliza E. Carpenter." So when it is alleged that the respondent "made his deposition as to facts in the premises" it is the same as "his deposition to prove facts stated in the petition."

The indictment sufficiently connects the false evidence with the petition; and, following the decision in the 30th, we think the words "brought a petition of divorce to the supreme court," or, "petitioned the supreme court," sufficiently aver the pendency of the suit in court to make it a judicial proceeding.

As to the second point. It should either plainly appear on the face of the indictment that the false evidence was material to the issue in the judicial proceeding; or else it should be expressly alleged that the false evidence was material. It is not necessary to state in the indictment what the issues were, and how the false evidence bore upon such issues, or was connected with other facts bearing upon them, so that it shall appear upon the face of the indictment *how* it was material. It is sufficient if the indictment expressly avers that it was material to prove certain facts, and that the respondent falsely swore to those very facts.

The indictment avers, "it became and was material to show whether the said Sleeper was at the house of L. D. Carpenter on the morning of the 2d of November, A. D. 1859, and whether he then had a conversation with said Carpenter, in the presence of certain other persons;" and then proceeds to allege that the respondent falsely swore "that on the morning of Nov. 2d, 1859, he stopped at said Carpenter's house and had conversation with Carpenter in the presence of one Magoon and the said Eliza E. Carpenter," &c. Although it does not appear how this evidence was material, yet we think it sufficiently alleged that it was material. It cannot be said that upon the face of the indictment it appears that the false evidence was immaterial, and that therefore the indictment is bad, notwithstanding the general averment of materiality; for it is easy to see how the alleged conversation, in connection with other facts, might be material both as to the alleged cause for divorce, and as to alimony.

The allegation that the respondents "falsely, wilfully and corruptly" swore, is sufficient without the word "knowingly."

The demurrer is therefore over-ruled, and the judgment of the county court is affirmed. But pursuant to the agreement entered into in the court below, and to enable the respondents to replead,—the judgment is reversed *pro forma* and the case remanded to the county court to enable the respondents to replead.

WALTER CARPENTER *v.* JOSEPH F. MCCLURE.*

Trustee Process. Judgment. Promissory Note. Fraud. Contract. Pleading.

A judgment in a trustee suit in favor of a claimant does not determine what, if anything, is due the claimant from the trustee; but when the judgment is rendered the trustee is discharged, and the claimant is left to pursue his remedy against him the same as though no trustee suit had ever been brought, and the trustee has the same right to defend.

The plaintiff had possession of certain goods and chattels belonging to C. as a mere cover to defraud the creditors of C. by keeping said property beyond their reach by attachment; and for further protection conveyed the same to the defendant and took his note therefor under an agreement between them and C. that the defendant should dispose of this property and pay the avails thereof over to C. and that this should operate as a payment and discharge of the note. *Held*, that a performance of the contract by the defendant would constitute a defence to an action on the note by the plaintiff.

Such a contract need not be in writing to make it valid, consequently it need not be so alleged in a plea.

In this state it is not only necessary to demur specially to the defect of duplicity, but the particular in which the duplicity is claimed to exist, must be set out.

ASSUMPSIT upon a promissory note executed by the defendant and payable to the plaintiff. Plea, the general issue, and two special pleas in bar,—to which the plaintiff replied, and to the replication the defendant demurred.

The defendant alleged in his pleas that on the —— day of December, 1850, the plaintiff was possessed of certain goods and chattels named for which this note was given, as the property of one William

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* This case was heard at the March Term, 1863, and decided at the March Term, 1864.

F. McClure, the plaintiff having no interest therein, but holding possession of and claiming title to the same for the purpose of protecting it from attachment by the creditors of the said William F., and for the sole benefit of William F.; that on said day of December a contract was entered into by the defendant, the plaintiff and William F. McClure, for the purpose of further protecting the said goods and chattels from the creditors of William F., he being largely indebted, by which it was agreed that the plaintiff should convey to the defendant said property, and receive his promissory note therefor, to be discharged by the defendant's disposing of said goods and chattels and paying over the avails thereof to William F. McClure; that this was done for the purpose of defrauding the creditors of William F. by putting the said property beyond the reach of attachment by his creditors; that in pursuance of this agreement the plaintiff delivered the said goods and chattels to the defendant and received his note therefor, which is the note declared on; that the goods and chattels were disposed of and the avails paid over to said William F. in full payment and discharge of this agreement and the aforesaid indebtedness, before the commencement of this suit, all of which the plaintiff had notice.

The plaintiff replied that one Levi Boutwell commenced a suit against the said William F. McClure as defendant in an action of *assumpsit*, and against the said Joseph F. McClure as trustee of William F. McClure, returnable to the September Term of the Washington County Court of 1854, in which suit the trustee, Joseph F. McClure, defendant in the present suit, made a disclosure setting forth facts in substance as alleged in the pleas of the defendant in this suit; that Walter Carpenter, the plaintiff in this action, was cited in as claimant of the goods, chattels and credits set forth in the disclosure, which were the same as those mentioned in the defendant's pleas in this suit; that the claimant being admitted to prosecute and defend his claim to the property and rights aforesaid, alleged that on the day of the execution of the note, which is declared on in this suit, the said goods and chattels were the property of the claimant; that the same were sold and delivered to the trustee Joseph F. McClure, and his said note was executed in payment therefor, of which he was the true and *bona fide* owner; that the said Boutwell

made answer to the claimant's declaration of his claim; and that it was finally adjudged by the supreme court that the trustee Joseph F. McClure became the owner of the goods and chattels named in his disclosure, against the said William F. absolutely, and against all other persons, and that the alleged trustee be discharged; which said judgment was rendered upon the very same issues and matters and upon the very same questions attempted to be put in issue by the pleas of the defendant, Joseph F. McClure, in this suit. To this declaration the defendant filed a general demurrer.

The court at the June Term, 1862, PECK, J., presiding, sustained the demurrer and held the replication insufficient,—to which the plaintiff excepted.

Peck & Colby, for the plaintiff.

I. The pleas are bad and constitute no defence. In the first place, the contract is valid and binding as between the parties, and is only void as to creditors, § 32, p. 672, G. S. In the second place, the defendant is not to be permitted to set up his own *fraud* to avoid his contract. *Peaslee* v. *Barney*, 1 D. Chip. 331; *Martin* v. *Martin*, 1 Vt. 91; *Conner* v. *Carpenter*, 28 *ib.* 237; *Boutwell* v. *McClure & Trus.* 30 *ib.* 674; *Drinkwater* v. *Drinkwater*, 4 Mass. 354; *Bailey* v. *Foster*, 9 Pick. 139; *Dyer* v. *Fitzhenry Homer*, 22 *ib.* 253; *Wearse* v. *Peirce*, 24 *ib.* 141; *Findley* v. *Cooley*, 1 Blackford, 263; *Exec'r of Stark* v. *Littlepage*, 4 Randolph, 368; *Richart* v. *Castalor*, 5 Binney, 109; *Killinger* v. ———, 6 Serg. & Rawle. 531; *Sherk* v. *Endress*, 3 Watts & Serg. 255; *Martin, Adm'r*, v. *Root et al.*, 17 Mass. 222; *Potter* v. *Yale College*, 8 Conn. 52; *Stewart* v. *Kearney*, 6 Watts, 453; *Osborne* v. *Moss*, 7 Johns. 161; *Jackson* v. *Garnsey*, 16 *ib.* 189; *Hawes* v. *Leader*, Cro. Jac. 270; same case, Yelverton, 196; *Roberts* v. *Roberts*, 2 B. & A. 368; *Bessie* v. *Windham*, 51 Com. Law Rep. 166; *Philpots* v. *Philpots*, 1 E. L. & Eq. 339; Iridell's Law, 4 vol. 102; *Baldwin* v. *Cawthorne*, 19 Vesey, 166; 3 Bac. Ab. pp. 313, 314.

II. The allegations in the pleas constitute no defence if the defendant is not permitted to set up his fraud. The note cannot be controlled by the agreement, as that was contemporaneous with the execution of the note and not in writing. *Conner* v. *Carpenter*, 28 Vt. 237, is decisive of this point. If the agreement was in writing

the plea should have averred it. 1 Saunders, 276, a. note 2; Com. Dig. "Assumpsit" F. 3; 2 Saunders' Plea & Ev. 657; 1 Ch. Plea. 571; *Isaacs* v. *Elkins*, 11 Vt. 679; *Bradley* v. *Bentley*, 8 Vt. 243; *Reed* v. *Wood*, 9 Vt. 285.

III. The issue presented by the 2d and 3d pleas is identical with that set forth in the replication as adjudicated in the suit *Boutwell* v. *McClure*, and *McClure Tr.* and *Carpenter*, claimant.

We insist that the trustee, who is defendant here, cannot try that issue again.

a. Our statute which provides, when the trustee is discharged, that the judgment shall be no bar to a suit by the *debtor* against the *trustee*, does not apply to the *claimant*. If the claimant is bound by the judgment when against him, why may he not have the benefit of judgment in his favor? All analogies favor our view of the subject.

b. The plea does not amount to a plea of payment. No allegation is made that the amount was paid or any particular sum, or that it was accepted. It must be expressly averred that the goods or money were *accepted* in satisfaction and discharge. *Drake* v. *Mitchell*, 3 East, 256; 1 Str. 573; 1 Saund. Pl. & Ev. 36.

c. If the pleas contain the defence of payment, then they are bad for duplicity, for they also set up the defence of fraud on creditors.

Wm. Hebard, on the same side, insisted that the special pleas were insufficient, as the very same facts therein set up, had been tried between the same parties and upon the same issue, and the defendant is estopped from again pleading these facts in defence of this action, and cited Phillips Ev. 225, *et seq.*; *White* v. *Ward*, 9 Johns. 232; *Jones* v. *Scriven*, 8 Johns. 353; *Marriott* v. *Hampton*, 7 Term, 265; *Etheredge* v. *Osborn*, 12 Wend. 399; *Manny* v. *Harris*, 2 Johns. 24.

C. W. Clarke, for the defendant, maintained, 1st, that Joseph F. McClure, the alleged trustee in the suit, "*Boutwell* v. *McClure & Tr. Carpenter*, claimant," was not estopped by the judgment in that suit from making any defence in this suit brought by the same person who was claimant in that suit; 2d, that the defendant's pleas in this case are admissible both at common law and under the statute. *Smith* v. *Hubbs*, 1 Fairf. 71; *Nellis* v. *Clark*, 20 Wend. 24; same case, 4 Hill, 424; *Walker* v. *McCornice*, 10 Yerger, 228; *Davis* v.

Holding, 1 M. & W. 159. The consideration of a note may always be inquired into, and here we find it fraudulent. The plaintiff founds a claim upon his own fraud. The law will leave the parties where it found them. It makes no difference who starts the objection, or upon whom lies the burden of proof. 2 Pars. Con. 280; *Jones* v. *Yates*, 9 B. & C. 538, (17 E. C. L. 224;) *Holman* v. *Newland*, Cowp. 341; *Wheeler* v. *Russell*, 17 Mass. 280; *Russel* v. *DeGrand*, 15 Mass. 35. The facts in this case clearly distinguish it from those cited by the plaintiff's counsel. There was a failure of consideration. The defendant got no title to the goods because the plaintiff had none to convey. Neither of these parties was to profit by the transaction, and neither of them ought to be permitted to do so. The case is widely different from one in which a debtor conveys his property to defraud his own creditors, which is the case immediately in the contemplation of the statute.

It was not necessary to set up in the plea that the agreement there stated, even if it were contemporaneous, was in writing. It is not required to be in writing by any statute, but only, under certain circumstances, by a rule of law. It may, however, appear on trial to be such a contract as might be proved by parol. The cases which require the plea to state the contract set up to be in writing, are those where the plea shows that the contract set up is such an one as is required by the statute of frauds to be in writing.

PIERPOINT, J. The questions in this case arise upon a demurrer to the plaintiff's replication to the defendant's plea.

The only question raised upon the replication is whether the judgment rendered in the suit in favor of Boutwell against William F. McClure in which the defendant here was cited in as trustee, and this plaintiff as claimant, is conclusive as to the plaintiff's right to recover the amount of the note then in controversy, of this defendant.

This question must be determined by the construction of our statute regulating the proceedings by trustee process, and the legal effect by such proceedings as may be had under it.

If in the course of the proceedings under this statute it shall appear that any goods, effects, or credits, that may be in the hands of the supposed trustee, are claimed by any other person, such claimant

may come in voluntarily, or may be cited in, and admitted, as a party to the suit, so far as it respects his title to the goods, effects, or credits, in question. When a claimant is thus admitted he becomes a party to the suit to a limited extent, that is so far only as regards his title to the property in dispute.

When the claimant thus becomes a party he files his allegations, setting forth his claim to the property, and an issue is formed thereon between him and the plaintiff; and that issue is, whether the property in the hands of the trustee is the property of the claimant, or the principal debtor. To that issue the trustee is no party. He takes no part in forming it, or in the trial that is had upon it, unless as a witness. He has no legal interest in it, and his rights are in no respect affected by it. If he has funds in his hands for which he is liable to either, it is a matter of indifference to him to which he pays it. Whether he has funds or not, or to what amount, is not then in issue. If upon the trial of that issue it shall be adjudged that the principal debtor has the better right to the funds in the trustee's hands, then if there shall be found therein sufficient to bring him within the statute, judgment is rendered against him as trustee, for the amount, or for the amount of the plaintiff's demand; and such judgment will be conclusive to protect the trustee in the payment of that sum, and if he pays it, such payment will be a good defence against any claim that may be made on him therefor, either by the principal debtor, or the claimant. And it is for the very purpose of protecting the trustee, in case judgment is rendered against him, that the claimant is made a party, and not for the purpose of determining whether the trustee has funds or not, or to what extent, but to determine to *whom* he is liable if at all.

But if it shall be adjudged that the claimant has the better right, then a judgment is rendered that the trustee be discharged. Now what is settled by that judgment? Simply that as between the claimant and the principal debtor the claimant has the right to the funds in the trustee's hands if any; but no judgment has been rendered fixing the amount in the trustee's hands, or that there is *any* amount in his hands. No judgment has been rendered that at all bears upon those questions on either side. The claimant is left to pursue his remedy against the trustee the same as though no trus-

tee suit had ever been brought, and the trustee has the same right to defend. Perhaps he could not set up by way of defence that the principal debtor was the owner of the property in his hands, but so far as the question of liability is concerned the whole matter is left open.

We think the county court was correct in holding that the plaintiff's replication is insufficient.

But it is said, that, conceding the replication to be insufficient, the defendant's pleas are bad, and present no legal answer to the declaration.

The defendant alleges in his pleas that the contract in pursuance of which he executed the note declared upon, was entered into between himself, William F. McClure, and the plaintiff, as a mere cover, with the view of defrauding the creditors of the said William F. by putting the property of the said William F. for which the note was given, beyond their reach by attachment, and that the whole was done for the purpose of securing the property or the avails of it to the said William F., and that it was also agreed between the said parties, that the defendant should dispose of the said property and pay the avails thereof over to the said William F., and that his doing so should operate as a payment and discharge of said note and of all the defendant's liability to the plaintiff thereon. And the defendant alleges that before the commencement of this suit he did dispose of said property and pay the avails thereof to the said William F. according to the terms of said agreement.

Without stopping here to discuss the question, as to the effect of the alleged fraudulent character of the transaction, upon its validity, as between themselves, it is very clear that if the defendant has performed the agreement on his part and done that which by the terms of the agreement was to operate to discharge his liability upon the note, that would constitute a defence to the plaintiff's action. And the effect must be the same whether the agreement be regarded as valid and binding between the parties, or as void by reason of the fraud.

Again it is urged that as the plea states that the agreement was made at the same time the note was executed as a part of the same

transaction, and as the agreement alters, and varies, the terms of the note, the plea should have alleged that the agreement was in writing, and for want of such allegation is bad.

The contract as set forth in the plea is not one of that class that the law requires to be reduced to writing. A verbal contract of this character, when proved, is just as valid and binding as it would be if it was in writing; consequently in setting out such a contract in a declaration, or plea, it is not necessary to allege that it is in writing. Whether the contract set out in this plea was reduced to writing or not is a matter that cannot be determined by the plea itself; that can be determined only upon the trial of an issue formed upon it. If the pleader attempts to prove the contract by *parol* evidence it would be excluded upon the objection of his opponent. The rule however that *parol* evidence cannot be received to vary or contradict a written contract, is a rule of evidence, and may be waived. If the party having the right to object to such evidence omits to do it, and the evidence is admitted and the alleged facts are thereby established, he cannot then avoid their effect, by claiming that the testimony should have been in writing. So too if instead of taking issue upon the plea, he admits the truth of the allegations by a demurrer, thereby rendering all evidence unnecessary, he cannot then avoid the effect of the admitted facts, on the ground that if he had denied them, they could not have been proved by legitimate testimony.

It is further urged that the plea is bad for duplicity inasmuch as it alleges fraud in the contract, in pursuance of which the note was executed, that avoids the note, and also a performance of that contract on the part of the defendant that in effect discharges his liability upon the note.

Whether the plea is double or not is a question that it is not necessary now to settle, for if it is obnoxious to that objection, it is quite clear that in the present state of the pleadings the plaintiff cannot avail himself of it.

The rule that extends the effect of a demurrer back over the prior pleadings, limits its operation to defects in substance, such as are reached by a general demurrer. Duplicity does not consist in a deficiency in substance, but rather in an excess, the pleader alleging

two grounds of claim or defence when either would be sufficient, and the defect consists in the form of pleading them, that is, in joining them in the same count or plea instead of pleading them separately. Duplicity is a defect that can be taken advantage of only by special demurrer, at common law, and is the only defect that at common law is not reached by a general demurrer. In this state it is not only necessary to demur specially, but the particular in which the duplicity is claimed to exist must be set out.

Other objections have been made to the plea but they come within the same principle.

These conclusions result in an affirmance of the judgment below, but under the agreement of the parties as appears by the exceptions the judgment may be reversed *pro forma*, a repleader awarded, and the case remanded.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF WASHINGTON,

AT THE

AUGUST TERM, 1864.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUSTICE,
HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
} ASSISTANT JUDGES.

B. F. CELLEY *v.* GEORGE GRAY.

U. S. Revenue Stamp. Award.

No U. S. revenue stamp is required upon an award of arbitrators in order to make it valid.

DEBT upon an award. The court rendered judgment for the plaintiff upon the award, on an agreed statement of facts. The award and submission were given in evidence, in connection with the agreed statement of facts. The only objection made by the defendant against a recovery by the plaintiff was that a U. S. revenue stamp was requisite to the validity of the award, and that it was void for the reason that no such stamp was put upon it at the time of the making or publication of the award.

The court, at the March Term, 1864, PECK, J., presiding, decided that no stamp was required by the laws of congress upon the award, and rendered judgment for the plaintiff,—to which the defendant excepted.

Peck & Colby, for the defendant.

The stamp act being for the purposes of revenue, should be construed liberally.

The presumption is that all papers are required to be stamped.

An award should be considered within the stamp act if its language will admit of it.

Its language does admit of it.

1. It may be considered as a contract.

2. It may be considered an appraisal of damages.

3. It may be considered as a certificate.

The argument that it is a paper well known and hence the omission to name it specifically raises a presumption against it, cannot obtain.

1. Because many papers equally as well known are held to be within the law, though not specifically enumerated; like assignments and bills of sale.

2. Because the first paragraph of schedule [B.] by its broad language was intended to cover all papers not specifically enumerated.

Wing, Lund & Taylor, for the plaintiff.

POLAND, Ch. J. The only question presented by the exceptions in this case is, whether by the internal revenue laws of the United States, an award of arbitrators is required to be stamped in order to its validity.

The principle established by the English courts, under the stamp acts of that country, "that the act is to be construed strictly, and is not to be extended by construction, beyond cases that come clearly within its terms," equally applies to our law.

The act does not name awards of arbitrators among those instruments required to be stamped.

The framers of the law aimed apparently as far as possible to name specifically all instruments required to be stamped, and if it was intended to include awards, it is singular they were not named,

They are instruments of so frequent occurrence, and of so important a character, and neither in legal or common language ever bearing any other name except that of awards, that it would be very singular they should be forgotten, or intended to be included under some general name or class.

It is claimed that they are included in some of the general descriptions of instruments requiring stamps—*agreements, or contracts, or certificates.* But it is a sufficient answer to say that an award of arbitrators is never described or spoken of as either the one or the other, and the terms are inappropriate to such an instrument.

An award is in a certain technical sense a contract, precisely the same as a judgment, but neither is ever so spoken of, either in common parlance, or in the language of legal proceedings.

The term contract or agreement, is ordinarily applied to such instruments only as are the result of negotiation or arrangement between parties.

An award is an adjudication, or determination between parties, though the tribunal is selected, and derives its powers from the submission, which is strictly a contract between the parties. Its character is more that of a judgment than a contract. It is equally conclusive between the parties, but requires to be enforced by action, by reason of the lack of power of such domestic tribunals to enforce it by process of execution.

It is apparent, we think, that the framers of the law intended to make the law analagous between ordinary law proceedings, and those of arbitrators.

A writ by which a suit is commenced, is required to be stamped, but no stamp is required upon the after proceedings by which the matter is brought to a final determination. No stamp is required on a verdict or a judgment.

So a stamp is required on an agreement or contract by which a controversy is submitted to arbitrators, but none upon the award which determines the controversy.

The term *certificate*, is less applicable to an award than the terms contract, or agreement. It is in no proper sense a certificate.

It is said that it may properly be called a certificate of appraisal of damages. But an award may be for damages, or it may not.

It is not a necessary part of an award, nor is it its usual principal purpose. The language properly applies to a wholly different class of instruments.

We are satisfied that the court below decided correctly in holding the award good without a stamp.

Judgment affirmed.

EVANS MCCRILLIS *v.* SILAS CARLTON.

Contract. Fraud.

A purchaser cannot rescind a contract induced by misrepresentation and fraud, after he has disposed of the purchased property, by offering to restore to the vendor what he, the purchaser, has received for it, although he disposed of it before discovering the fraud.

His remedy will be an action for damages, or a reduction from the contract price, to the same extent, if that is yet unpaid.

ASSUMPSIT upon the common counts for goods sold and delivered. Plea, the general issue. Trial by jury, September Term, 1862, PECK, J., presiding.

The plaintiff, after the filing of new counts, under objection by the defendant, introduced evidence tending to prove that on the 6th day of February, 1860, he and one G. A. Gilman were the owners of between 14,000 and 15,000 pounds of butter, at Marshfield, each an undivided half, and that on that day he sold his undivided half to the defendant at the price of twenty-one cents per pound, by the consent of Gilman; that the plaintiff was to receive his pay with interest, by the 1st of April following, and as much sooner as the defendant should receive the money, from time to time, out of the proceeds of sales of the butter. It appeared that there was a loss on said half of the butter of $398.32 from the contract price agreed on in the defendant's purchase of the plaintiff, which the defendant neglected and refused to pay. The plaintiff claimed to recover this balance of $398,32, and interest.

It appeared that butter, prior to and about the first of February had been high in market, and that about that time it was some lower and sales dull; that good lots of butter could not be sold in market for over eighteen cents per pound, and that there was but little prospect of the market being better that spring.

There was no dispute about the contract price, stipulated in the sale to the defendant, nor about the amount of payments made by the defendant to the plaintiff.

The defendant introduced evidence tending to prove that on the 6th day of February, 1860, aforesaid, the plaintiff had the knowledge of the situation and prospect in relation to the Boston butter market, and the defendant was wholly ignorant of the same; that on that day the defendant, learning that the plaintiff had come home from Boston, and not having heard from thirty tubs of butter which he, the defendant, had previously sent to Boston, applied to the plaintiff to know whether he had learned in Boston whether the defendant's butter was sold or not; to which enquiry the plaintiff replied that the defendant's butter was all in market and all sold for twenty-five cents per pound; that the defendant then inquired of the plaintiff if he had sold his butter, to which the plaintiff replied that he had not; that the butter merchants were holding on to their butter and thought it would be higher in March; that the plaintiff then proposed to sell his butter to the defendant, saying he wanted to go into dealing in horses (as it appears he did immediately after) and had not time to attend to the butter; that the plaintiff made no disclosure to the defendant of the fall of butter in market; but the defendant was induced to make the trade, relying on a warranty of the quality of the butter and on the statement that the defendant's butter had been all sold at twenty-five cents per pound; that the defendant that day, and before he closed the trade, inquired of the plaintiff the second time if the defendant's butter was sold at twenty-five cents per pound, and the plaintiff replied it was.

The defendant's evidence tended to prove also that a portion of the butter was of poor quality; that before he discovered this fact he had disposed of the butter and received pay for it, and paid the same all over to the plaintiff, besides paying freight and losing his time.

The defendant also offered evidence tending to prove that on the 6th day of February, 1860, aforesaid, there had been sold but three tubs of the defendant's butter, and that the remainder of said thirty tubs was afterwards sold, some of it as low as twenty cents per pound, and that the plaintiff was not informed by Howe, who had defendant's butter for sale, that it had all been sold as aforesaid.

The evidence on the part of the plaintiff tended to show that he did not warrant the butter, nor make any representations, except as matter of opinion, as to the quality of the butter.

There was no evidence on either side tending to show any misrepresentation by the plaintiff as to the state of the market or price of butter, except the evidence above stated as to the defendant's butter being sold at twenty-five cents.

It appeared from evidence on both sides that when the plaintiff was in Boston the butter dealers generally held out that the prospect was that butter would be the highest in March, and the plaintiff's evidence tended to show that such butter dealers then so informed him, and advised him to hold his butter till March, and that he believed such was the prospect when he sold the butter to the defendant; the plaintiff's evidence also tended to prove that the plaintiff did not tell the defendant that his, the defendant's, butter was all sold, or make any false representations to the defendant on that subject, or any other.

The other facts, together with the requests of the defendant to the court, and the charge in respect thereto, are set forth in the opinion. To the refusal of the court to charge as requested and to the charge as given the defendant excepted.

Verdict for the plaintiff for $313.55.

Wing, Lund & Taylor, for the defendant, insisted that every contract, which has been induced by fraudulent representations, or by intentionally concealing the true state of the facts with the intent to overreach the other party and obtain an advantageous contract, is voidable at the election of the party injured. *Fitzsimmons* v. *Joslin*, 21 Vt. 129; *Loomis* v. *Wainwright*, 21 Vt. 520; *Adm'r of Wilson* v. *Green et al.*, 25 Vt. 450; *Redington & Co.* v. *Roberts*, 25 Vt. 686; *Baxter* v. *Downer*, 29 Vt. 412; *Paddock* v. *Strobridge*, 29 Vt. 470; *Adams* v. *Soule et al.*, 33 Vt. 538; *Phelps et al.* v. *Conant et al.*, 30

Vt. 277; *Concord Bank* v. *Gregg*, 14 N. H. 331; *Hoit* v. *Holcomb*, 3 Foster, 535; *Mathews* v. *Bliss*, 22 Pick. 52.

The defrauded party does not lose his right to rescind because the contract has been in part executed and the parties cannot be fully restored to their former position, if the parties rescind with reasonable dispatch upon discovering the fraud. *Downer* v. *Smith*, 32 Vt. 1; *Concord Bank* v. *Gregg*, 14 N. H. 331; *Holbrook* v. *Burt*, 22 Pick. 554; *Ketletas* v. *Fleet*, 7 Johns. 328.

P. Dillingham, for the plaintiff.

There can be no rescinding of the contract on the part of the defendant, unless he can or has put the plaintiff *in statu quo*, or has offered to do it and the plaintiff refused. *Harrington* v. *Wells*, 12 Vt. 505; *Thornton* v. *Wynn*, 12 Wheaton, 183; *Warner* v. *Wheeler*, 1 D. Chip. 159; Parsons on Contracts, 1475; *Poor* v. *Woodburn et al.* 25 Vt. 235; *Shepard* v. *Temple*, 3 N. H. 455; *Perley* v. *Balch*, 23 Pick. 286; *Hunt* v. *Silk*, 5 East, 449; *Allen* v. *Hooker*, 25 Vt. 137; *Harrington* v. *Stratton*, 22 Pick. 510; *Cook et al.* v. *Carter*, 9 Cush. 266; *Street* v. *Blay*, 2 B. & A. 456.

POLAND, Ch. J. The exceptions taken to the leave given the plaintiff to file new counts, is not now insisted on.

That part of the defence growing out of the alleged misrepresentation by the plaintiff of the quality of the butter sold, is also disposed of, as no exception was taken to the instructions given the jury upon that branch of the defence.

The remaining questions grow out of the alleged false representations of the plaintiff as to the state of the market for butter in Boston at the time of the trade, and the future prospect of the market.

The court charged that the plaintiff was not bound to disclose to the defendant his knowledge of the state of the market; that in respect to that, each party must look out for himself.

It is hardly claimed that in this respect the court committed any error, and in respect to the sale of marketable commodities, such has always been understood to be the rule, and seems to have been sanctioned by this court in *Paddock* v. *Strobridge*, 29 Vt. The court did charge that if the plaintiff knowingly misrepresented the existing state of the market to the defendant, and that the defendant relied upon his representations, and was thereby deceived to his prejudice,

it would not render the contract void so as to preclude any recovery, but would entitle the defendant to claim a deduction from the contract price to the extent of the damages he sustained by reason of such misrepresentation.

The main objection made by the defendant to this part of the charge is, that the court did not comply with his request, and charge that such fraudulent misrepresentation entitled him, at his election, to avoid the contract.

But the charge of the court, and their neglect to charge as requested, must be looked at in reference to the state of facts before the court. The principle is undoubted, that where a contract is induced by misrepresentation and fraud, the party who has been defrauded, may, upon discovering the fraud, rescind the contract, and thereby relieve himself from obligation to perform it, although a mere breach of warranty without fraud would not entitle him to do so. But the difficulty in the present case is, that the facts were not such as to entitle the defendant to claim any such charge. The defendant never did rescind the contract, or offer to rescind it, and had before the suit was brought actually disposed of the entire property purchased of the plaintiff and put it wholly out of his power to rescind. In such case, the defendant having put it out of his power to restore to the plaintiff what he has received by virtue of the contract, must rely upon the remedies which the law reserves for him, either by a separate action for the fraud, or by claiming a reduction from the contract price, to the extent to which he has been a sufferer by the fraud.

It has been held in some cases, that although the purchaser may have made some partial change or disposition of the purchased article before discovering the fraud, this would not deprive him of the right to rescind, provided he was able to restore substantially what he received by the purchase, and offered to do so immediately on discovering the fraud. But no case has been brought to our attention, and we know of none, where it has ever been held that where the purchaser had wholly disposed of the purchased property, either for money or anything else, before discovering the fraud, that he could rescind by offering to restore what he had received for it. He has then received the full benefit of the contract, and the avails of

his purchase, and if these were less than he had the right to expect, and the loss was occasioned by actionable fraud on the part of the vendor, the law furnishes an adequate remedy by an action for the damage, or by a deduction from the contract price to the same extent, if that is yet unpaid.

In the present case the defendant claimed that the loss he suffered on the sale of the butter, between the price he agreed to pay the plaintiff for it and what he received in market for it, was all occasioned through the fraud of the plaintiff.

If his evidence established this, then under the charge of the court the jury should have given the defendant a verdict, and the error by which the defendant suffered was not in the court, but in the jury, and is beyond our power to correct.

But the reasonable supposition is, that the evidence did not prove so much as the defendant claimed.

The court also charged that what the plaintiff said to the defendant as to the future prospect of the market for butter was necessarily, and upon its face, but the expression of opinion or judgment, and was not such a misrepresentation as would entitle the purchaser to avoid the sale, or maintain the action.

If the representation was of the existence of particular facts, in their nature calculated to affect the future state of the market, and were false, and known to be so by the seller, and the purchaser was thereby deceived and defrauded, I should think they amounted to an actionable fraud. But such does not appear to have been the representation of the plaintiff.

It did not appear but that the plaintiff honestly believed all he stated in relation to the prospective improvement of the market for butter, nor was there any evidence but that the plaintiff was advised by butter dealers as he represented to the defendant. Upon the state of evidence presented by the case, we think the court gave the defendant all legal opportunity to make his defence successful, so that he has nothing to complain of which is in our power to remedy.

Judgment affirmed.

HEMAN CARPENTER v. LAWRENCE BRAINERD AND OTHERS.

Book Account. Contract.

The plaintiff delivered to the defendants a quantity of lumber according to the contract between them, a portion of which the defendants used, but being dissatisfied with the plaintiff's measurement of the remainder, which was according to the custom of the place, refused to accept it. *Held*, that the contract being entire, the actual acceptance and use of a part may well be treated as an acceptance of the whole.

Held, that there may be a recovery for the same in a book action.

BOOK ACCOUNT. There was no question in respect to any item of the plaintiff's account, except the third. The auditor reported as to this item in substance that in the fall of 1860, the defendants, as trustees of the Vermont Central Railroad, by their agent, E. F. Perkins, contracted with the plaintiff to take of him the hemlock, spruce, ash and basswood lumber that was on some twelve acres of land the plaintiff was to clear the next winter.

The lumber was all cut, sawed and delivered at a place at the railroad works, designated by Perkins, and occupied by the defendants, and according to the contract between the plaintiff and Perkins; and the same was actually accepted and used by the defendants except the basswood lumber named in item No. 3. A part of this was sawed into inch boards and the remainder into three and one-half inch planks.

After the basswood lumber was all drawn, the plaintiff requested Perkins to send a man to measure it. One Hodgden was sent, and first measured the boards, the boards and plank being in separate piles. His measure of the boards was satisfactory to the plaintiff. Then Hodgden commenced on the plank. He measured the narrowest side only, squaring each plank, and giving the plaintiff the measure of each plank when squared, and throwing out all of the "wane."

Carpenter said the plank lumber should be measured so as to give him the measure of the inch boards there were in it, or as it was said, "each inch should be squared." Hodgden, under Perkins' instructions, declined to measure the plank as Carpenter insisted was right. Carpenter then sent the town surveyor of wood and lumber in Northfield to measure said plank, and he measured the same ac-

cording to the rule and practice in Northfield, which was according to the rule that the plaintiff insisted upon.

After the lumber was measured in part as above described by Hodgden, Perkins always treated it as the property of the plaintiff, and the plaintiff always claimed that it was the defendants'. Neither party has interfered with it since it was measured by the surveyor, and it now lies where it was delivered by the plaintiff, nearly spoiled by exposure.

All of the above lumber, except the basswood, was measured after it was delivered in the defendants' lumber-yard.

The auditor found from the testimony of Perkins that on the Boston and Providence, the Western Massachusetts, the Columbus and Cincinnati, and the Ogdensburgh railroads, it was the practice to exclude, in measuring, all the "wane," and to allow only what each piece of lumber will square.

The defendants' counsel insisted that the action on book account could not be sustained for the basswood lumber charged in item No. 3, for the want of sufficient delivery and acceptance of the same. The court at the March Term, 1864, PECK, J., presiding, over-ruled the objection, and rendered judgment on the report for the plaintiff for the whole amount found due by the auditor, including the item No. 3,—to which the defendants excepted.

Peck & Colby, for the defendants.

The lumber was manufactured articles and there could be no recovery in book account without acceptance. The report finds there was no acceptance. *Rider* v. *Kelley & Roberts*, 32 Vt. 268.

Heman Carpenter, for the plaintiff, maintained that the title to the lumber passed to the defendants *on delivery*. *Birge et al.* v. *Edgerton*, 28 Vt. 291; *Slate* v. *Barker*, 26 Vt. 647; *Hutchins* v. *Gilchrist*, 23 Vt. 82; *Sanborn* v. *Kittredge*, 20 Vt. 632.

The action of book account is the appropriate action, where there is a *sale and delivery* of the property. *Blish et al.* v. *Granger*, 6 Vt. 340; *Carpenter* v *Dole*, 13 Vt. 578.

POLAND, Ch. J. The defendants insist that the plaintiff cannot recover on book against them for the third item in his account for the *basswood lumber*, for want of such an acceptance by them as passed the property from the plaintiff to them.

It has been decided by this court in the case of *Latham* v. *Lewis*, and in one or two subsequent cases, none of which are yet reported, that where articles are manufactured upon a contract to be delivered at a future day, and when completed are offered to the party ordering them, and he wrongfully refuses to receive them, that the property does not thereby pass, so that an action for goods sold and delivered would lie, nor can they be charged on book and the price recovered in that form, but the only remedy is by an action for damages for refusing to accept.

In other words the title does not pass without a delivery and acceptance. The reason of this is well stated by ALDIS, J., in the case of *Rider* v. *Kelly et al.*, 32 Vt. 268: "The vendee was entitled to examine them, and use his judgment in determining whether they came within the contract. They would not become his property against his consent; though if he wrongfully refused to accept them he would be liable in damages. He was not bound by the offer of delivery to accept them and treat them as his own. When the contract so plainly points for something further to be done by the purchaser, some further right or privilege to be exercised before actual delivery takes place, and actual possession and title change, then the possession and title must be held to remain in the seller, and he must take charge of the property and keep the same or sell it as he sees fit."

We are entirely satisfied with the soundness of the decisions on this subject, and have no disposition to recede from them. But is the principle decided in them conclusive against the plaintiff's right to recover this item, as the defendants claim? The defendants contracted with the plaintiff for all the lumber on twelve acres of land, to be sawed, and delivered upon the railroad premises of the defendants at Northfield.

The lumber was all sawed according to directions given by the defendants' agent, and was drawn and delivered by the plaintiff upon the defendants' premises, at a place designated by their agent.

There was and is no complaint but that the lumber in every respect was such as the plaintiff contracted to deliver. It was delivered into the possession of the defendants as the contract stipulated, and was placed where their agent directed. The defendants actually

used all the lumber purchased of the plaintiff except the basswood named in this item.

Upon these uncontroverted facts is there any question but that the title passed to the defendants, at least if the plaintiff so elected?

Suppose after the lumber had been thus delivered, a creditor of the plaintiff had attached it as the property of the plaintiff?

Or that after such delivery the lumber had been consumed by fire, or otherwise destroyed, would it have been the plaintiff's or defendants' loss?

The case of *Hunt* v. *Thurman & Martin*, 15 Vt. 336, decides the last of these questions, and determines that in such case the property had passed to the defendants, and the loss would be theirs. See cases cited by court and counsel in the case referred to.

The fact that the lumber had not been measured, and that a dispute arose between the parties, as to the quantity, and proper rule of measurement, did not affect the question.

The contract for the lumber was entire, and the actual acceptance and use of a part may well be treated as an acceptance of the whole, as was held in the cases of *Blish et al.* v. *Granger*, 6 Vt. 340, and *Carpenter* v. *Dole*, 13 Vt. 578. The measurement claimed by the plaintiff was according to the custom of the place, by which the defendants should be held to pay.

Judgment affirmed.

ALDEN H. WHITCOMB *v.* TOWN OF BARRE.

Husband and Wife. Pleading. Highways.

In this state, a husband, by a suit in his own name alone, may recover of a town for loss of service and expense resulting from an injury to his wife caused by a defect in the highway.

ACTION ON THE CASE to recover damages for an injury to the plaintiff, his horse, wagon and harness, and for an expenditure of time and money for the care, nursing and doctoring of the plaintiff's wife for an injury and sickness, occasioned by the insufficiency and want of repair of a highway in the town of Barre, and also for the loss of her services and society.

Plea, the general issue. Trial by jury at the September Term, 1863, KELLOGG, J., presiding.

On trial, the plaintiff offered evidence tending to show a large expenditure of time and money for the care, nursing and doctoring of his wife, and the loss of her society and services, as alleged in the declaration,—to which the defendant objected, but the objections of the defendant were over-ruled, and the evidence was received. Verdict for the plaintiff. To the decision of the court over-ruling the said objections and allowing the said evidence to be received, the defendant excepted.

E. E. French, for the defendant.

I. The liability of the town, being created solely by statute, cannot be extended beyond the statute measure thereof; and the rule of common law that the husband alone can sue for expense of cure and loss of services of the wife does not apply. Angel on Highways, 268, and cases cited; *Chisday* v. *Conton*, 17 Conn. 475; *Tisdale* v. *Norton*, 8 Met. 388; *Howard* v. *Lowell*, 4 Cush. 310; *Kelsey* v. *Glover*, 15 Vt. 708; *Sanford* v. *Augusta*, 32 Maine, 536; *Loker* v. *Brookline*, 13 Pick. 343; *Mower* v. *Leicester*, 9 Mass. 247.

II. Time and money expended for care, nursing and doctoring, and loss of society and services of the wife, are not such special damages to the husband's person, team, carriage, or other material objects which can be denominated property within the meaning of the statute. If the person injured is a party to the suit, then these items of damage may be recovered, being incident to the physical injury, but the husband alone cannot recover for them. Angel on Highways, 269; *Reed* v. *Belfast*, 20 Maine, 246; *Bradley* v. *Southborough*, 6 Cush. 141; Hilliard on Torts, 586; *Weeks* v. *Shedley*, 33 Maine, 271.

Heaton & Reed, for the plaintiff.

BARRETT, J. This is an action on the case under the statute, declaring for an injury to the plaintiff's horse, harness and wagon, and for expense and loss of service resulting from an injury to the wife on the same occasion, caused by a defect in the highway over which the plaintiff with his team, and in company with his wife, was riding.

Exception was taken to the admission of evidence tending to show such expense and loss of service resulting from said injury to the

plaintiff's wife, and upon this the case is before this court for revision.

It is conceded by counsel for the defendant, that, in a suit brought in the name of the husband and wife for injuries to herself, the town would be liable for the expense and loss of service to which the husband has been subjected on account of such injury, and that the same might be recovered for in such action. So the point is not that the town is not liable at all in this respect, but that the plaintiff is not entitled to recover for them in an action brought in his own name alone; and cases decided by the courts of Maine, Massachusetts and Connecticut are cited and relied on to support this point. We have carefully examined and considered those cases, and are unable to adopt them, as controlling the law in this state on this subject, or as satisfying us that the law should be so held by this court.

Our statute imposing liability upon towns for damage caused by defects in highways has been in existence since 1797, without variation, except in the revision of 1839 the words "or other property" were added. These words can hardly be regarded as affecting such liability, either by enlargement or diminution.

In the case of *Bailey* v. *The Town of Fairfield*, Bray. 126, the question was directly presented whether under this statute, a father could recover in his own name for loss of service and expense of cure of his minor daughter, who was injured by reason of defect in a highway. The case seems to have been fully argued by counsel, and considered by the court; and it was held that such action was sustainable,—the court saying that the words "special damage" must mean other than "direct bodily injuries,"—that to make sense of the section taken together, and to carry into effect the obvious design of the law, every special damage must be included which is known to the law as an "*actionable* injury." That case has been regarded as settling the question, so that, so far as the present members of the court know, the point has not since been brought before the court till the present case. We think the settled understanding of the profession, and the uniform course of practice has been conformable to this view, and that the legislature, in the various revisions, have acted upon the same understanding.

It is known to be quite common, in cases of injury to the wife, for

the husband to bring two suits, one in which his wife is joined as plaintiff for the personal injury to herself, and one in the name of the husband alone for the loss of service and expense of cure of the wife.

In view, therefore, of the adjudication in *Bailey* v. *Fairfield*, and the judicial and legislative history of the subject since that time in this state, we are bound to regard the construction of the statute, and the rights of action under it, as firmly established.

And this by no means, in our view, trenches upon the principle, held not only in other states, but in this also, that the liability of the town for such injuries is created by the statute, and cannot be asserted beyond the provision by statute in that respect.

It will be seen that the statutes of the states from which cases have been cited differ from ours in phraseology, and well warrant the construction given to them by the courts of those states; while the terms used in our statute equally well warrant the construction given to it by our court.

The present statute of Massachusetts uses language which, in itself, might well be held to have a force and effect as extensive as our own. But in *Harwood* v. *City of Lowell*, 4 Cush. 310, SHAW, Ch. J., traces the course of legislation on this subject, and comes to the conclusion that the present statute of that state was intended by the legislature to be but a re-enactment of the provision of 1786, which was, "If any person shall lose a limb, break a bone, or sustain any other injury in his person, or in his horse, team, or other property," &c.

Ch. J. SHAW says, "Were this (the present statute) a new act of legislation, expressed in the same terms, we should regard it as more equivocal; but it is not a new provision; it is the revision of preceding enactments." * * "The legislature well understood that the prior law gave damages only for direct injury to the person, and direct injury to personal property, and intended to re-enact the same rule in the present terms."

His comments on the cases cited from Maine and Connecticut present, in a clear light, what is quite obvious upon consideration, that those cases, as well as the case he was deciding, stood upon the force of the terms used by the respective statutes.

A single additional remark may be justifiable. Some of the cases cited by the defendant's counsel show, and counsel concedes, as before said, that the town may be held liable for just these consequential damages, in a suit brought in the name of the husband and wife. It strikes us that this involves two palpable incongruities,—one, that while it is held that, by the terms of the statute, the town is not liable for incidental and resulting damages by loss of service, and by expense of cure, in case of injury to the wife or minor child of the man, still such damages may be recovered in a suit in the name of the husband and wife, or by the minor suing by his next friend;—the other, that damages which affect the *man alone* who loses the service, or pays the expense, should be recoverable in a suit in which persons who have no interest in them are made parties plaintiffs.

Upon the construction given to our statute and the practice under it, both these incongruities are avoided, and the reasonable rules of the common law, as to proper parties to actions, are allowed to have their legitimate application, and at the same time our statute is invested with no wider scope in visiting liability on towns, than are the statutes of the other states by a mere shift in violation of established rules of pleading.

The judgment is affirmed.

CHARLES J. SHELDON *v.* DAVID SHELDON & TRUSTEE, AND CLAIMANT.

Action. Practice. Discontinuance. Pleading.

An action in a case of open damages is considered as still pending after the entry of a default until the assessment of damages; and if the defendant dies before the assessment, and commissioners are appointed, the case will be subject to discontinuance under the provisions of § 16, ch. 53, G. S.

ASSUMPSIT. The facts pertaining to the point decided are set forth in the opinion. The case was discontinued upon motion by the claimant, at the March Term, 1864, PECK, J., presiding. Exceptions by the plaintiff.

Redfield & Gleason, for the plaintiff.

Hard & Ballard, for the claimant.

BARRETT, J. In this case the defendant was defaulted at the term at which the suit was entered, September Term, 1862, and the cause was continued from term to term without damages having been assessed. At the March Term, 1863, the wife of the defendant entered, by her next friend, as claimant, and a commissioner to take disclosure was appointed. The commission was issued February 4th, 1864. On the 18th of the same month the claimant filed her claim, and at the same time filed a motion to discontinue the cause on the ground of the death of the defendant and the appointment of commissioners by the probate court. On the next day the commissioners' report was filed. At the March Term, 1864, the claimant's motion to discontinue was urged, and sustained by the court; and to this exception was taken. Under this exception, the question is, whether the action was so pending, as to come within the operation of § 16 ch. 53, G. S. If a final judgment had been rendered against the defendant previous to his death and the appointment of commissioners on his estate, then, as is held in *Miller* v. *Williams & Tr.*, 30 Vt. 386, the action would not be so pending as to be subject to discontinuance under that provision of the statute.

In this case the declaration is in the common counts in general assumpsit, and no specification was filed. The plaintiff's cause of action was, in fact, a promissory note. But this was not disclosed by the record. The case stood then upon the effect of the mere entry of a default for the non-appearance of the defendant at the term the suit was entered in court.

We understand that the mere entry of a default, does not involve and amount to the rendering of a final judgment. The default is an incident, which entitles the plaintiff to a judgment, but does not determine either the kind, or amount of such judgment. The rendering of the judgment is to supervene upon, and succeed the entry of the default, and may require intervening proceedings in the case, in order to enable the court to render such a judgment as to law appertains. Sec. 43 ch. 30, G. S. implies all this. "When the defendant in any suit * * * shall not appear in person or by attorney

his default shall be recorded, and judgment rendered against him thereon, unless," &c.

Sec. 48 ch. 30, G. S. provides for ascertaining the damages, when judgment shall be rendered otherwise than on the verdict of a jury, and presupposes that the proceedings to be had are preliminary to the rendition of the judgment. Now it is well settled that in case of an open count, as in general assumpsit, the default determines nothing but the right of the plaintiff to some judgment; but leaves the matter open for further proceedings by way of assessment; and, until such proceedings are had, the case stands upon the right of the plaintiff to a judgment, but not upon a judgment in fact rendered. Upon the subject of the judgment to be rendered the defendant has a right to appear and be heard, and to contest all the elements upon which the plaintiff should claim a right to a judgment for any thing more than nominal damages.

This being so, it is quite plain that the action must be regarded as still pending between the plaintiff and the defendant till the measure of the plaintiff's right is ascertained, either by his own election to take a judgment for nominal damages, or by a proper assessment, and the judgment is in fact rendered.

In the present case, the history of it, spread upon the record, would show that no judgment had been rendered in it. Nor do we think the case can be found, where a default having been entered and the cause continued to a subsequent term without an entry of judgment, that the record states the judgment as of the term when the default was entered, but always as of the subsequent term when, in point of fact, the entry is, or should be made, or when the case is ended and leaves the docket.

Webb v. *Webb*, 16 Vt. 686, is instructive on this subject. We think the motion was properly sustained,—and this renders it unnecessary to consider the other exceptions in the case.

Judgment is affirmed.

ABEL MORRILL *v.* MARTIN B. BEMIS.

Warranty. Pleadings.

Where a declaration alleged that a horse was warranted sound except as to a specified defect, and did not allege that the effects of this defect were other than and beyond what was obvious, and operated as a breach of the warranty, it was *held*, that the plaintiff could not recover under such declaration for any unsoundness caused by said defect.

ACTION ON THE CASE for a breach of warranty and for false representations in the exchange of horses. Plea, the general issue. Trial by jury, March Term, 1864, PECK, J., presiding.

The plaintiff's declaration alleged a warranty of soundness in the horse except a bunch on one hind leg, and that the horse was unsound in other particulars.

It appeared that the defendant warranted the horse sound except as to this bunch, and the evidence was conflicting as to what he said in making the trade about the effect of the bunch.

The plaintiff's evidence also tended to show that the horse had other defects. The defendant's evidence tended to show that there was no unsoundness or lameness except that which was caused by this bunch near the foot.

The court submitted the case to the jury, both upon the ground of a warranty and upon the ground of false and fraudulent representations, so that the jury might have found a verdict for the plaintiff upon either ground.

In charging the jury as to the right of the plaintiff to recover upon the ground of a warranty of soundness, the court told them among other things not excepted to, that if they found no unsoundness in the horse, except that bunch, and that he was sound at the time of the trade, except so far as that bunch made him unsound, then there was no such breach of warranty of soundness as is alleged, as would entitle the plaintiff to recover under this declaration on the ground of a warranty of soundness, even if the bunch made him lame. To this part of the charge the plaintiff excepted. Verdict for the defendant.

J. P. Lamson, for the plaintiff.

C. H. Heath, for the defendant.

BARRETT, J. The plaintiff, in his declaration, does not allege any breach of warranty by reason of unsoundness caused by the bunch on the horse's hind leg. The jury found that there was no unsoundness except that produced by said bunch. It was only as to the matter of unsoundness in this respect, that exception was taken to the charge. We think this was properly put to the jury. If the plaintiff had alleged that that bunch, in its effects upon the horse, was other than and beyond what was obvious, and what the defendant warranted, the case might have had a different aspect. But every count excepts that bunch from the alleged warranty, and is destitute of any averment either of character or consequences attributable to it, that would operate a breach of the warranty of soundness.

Judgment affirmed.

A. H. FARR *v.* JOHN S. LADD, L. L. DURANT *Subsequent Attaching Creditor.*

Justice's Record. Confession of Judgment. Parol Evidence.

The record of the justice showed a judgment by confession. *Held,* that parol evidence offered by a subsequent attaching creditor to show that the defendant never appeared personally before the justice is inadmissable, the record of the judgment being conclusive.

DEBT UPON A JUDGMENT. There was no plea filed in the case, and no question was made, but that the record of the justice of the peace, before whom the declaration alleges the recovery to have been had, shows such judgment as is alleged. It was a conceded fact in the case that the record showed such judgment by confession.

Upon the trial at the September Term, 1863, PECK, J., presiding, L. L. Durant, who by leave of court entered as subsequent attaching creditor by trustee process, offered to show by parol, by himself and Luther Henry, that the defendant never appeared personally before the said justice who entered up the confession; that the defendant never saw the justice at all, but that the justice entered up the con-

fession of judgment by direction of the defendant, contained in a letter of the defendant, written in the jail at Montpelier, where the defendant was then confined, to said justice at Waterbury, where the justice resided, and where he was at the time, to enter up such judgment by confession; and that said Henry was the party who carried the letter to the justice, and that Henry then, and at the time the confession was entered by the justice, was the party beneficially interested in the judgment, and that this was known to Henry at the time he carried the letter, and when the confession was taken and entered up and recorded by the justice, which was done at Waterbury while the defendant was in jail at Montpelier, as above stated.

The plaintiff objected to the introduction of this evidence, and the court excluded it and rendered judgment for the plaintiff. As the case was tried without any written plea being filed, and the plaintiff's objection was general, not specifying the want of a plea as the ground of objection, the court did not exclude the evidence on the ground that no appropriate plea was filed, but excluded it on the ground that the record of the judgment was conclusive, and that the judgment could not be invalidated by such evidence.

To the decisions of the court said Durant as such attaching creditor excepted.

L. L. Durant, pro se.

A judgment is conclusive upon parties and privies. But when strangers' rights are brought in question, how can such a doctrine apply? Nothing but the personal appearance of the defendant gave the justice jurisdiction. G. S. ch. 31, § 21; *Shedd & Co.* v. *Bank of Brattleboro*, 32 Vt. 709.

The parties may show that the court had no jurisdiction. *Tibbetts* v. *Tilton*, 11 Foster, 273; *Demeritt* v. *Lyford*, 7 Foster, 548; *Hickley's Lessee* v. *Stewart*, 3 Howard, 750, (U. S.;) *Morse* v. *Presby*, 5 Foster, 299; *Elliott* v. *Peirsol*, 1 Peters, 328, 7 U. S. 601; *State* v. *Richmond*, 6 Foster, 232.

L. Henry and *Wing & Lund*, for the plaintiff.

POLAND, Ch. J. The defence in this case is made by the subsequent attaching creditor.

The statute authorizes a subsequent attaching creditor to appear in

the prior suit and contest the validity of the debt or claim on which it is founded.

It has heretofore been decided that a subsequent attaching creditor thus appearing is confined to defences to the merits, and that he cannot plead in abatement, or make other dilatory objection to the action.

In the case of *Fletcher* v. *Bennett*, 36 Vt. 659, the court had occasion to consider the extent of the right of such creditor to make defence to the prior action, and it was held that he stood in the first place in the right of the debtor himself, and could interpose any defence to the merits that the debtor himself might; and secondly, that he might set up his right as a creditor, and show that the prior debt was collusive or fraudulent between the creditor and debtor, and therefore invalid as to himself or other creditors, although the debtor himself might not be able to make such defence. In either view was the evidence offered by the subsequent attaching creditor in this case admissible?

In the first place, would it have been admissible if offered by the debtor himself?

The record of the judgment recited that the defendant personally appeared before the justice and confessed himself indebted, &c. The evidence offered was that he never did appear in person and make such confession; a direct denial and contradiction of the fact stated in the record.

It has repeatedly been held in this state that the records of justices of the peace are entitled to the same degree of credit and legal verity, as those of courts of more extensive jurisdiction, and cannot be impeached or counteracted by proof of their falsity.

This general proposition is not denied, but it is claimed that the evidence offered was to show that the justice had no legal jurisdiction to render such judgment, and that evidence is always admissible, to show that the court had no jurisdiction, and in that way overthrow the judgment of any court. It is often said in the books, that if the court have no legal jurisdiction their judgment is void, and that evidence may always be received to show such want of jurisdiction. To a certain extent this is true, but not to the extent to which we are asked to go in this case.

When evidence offered contradicts the record itself, it cannot be received, although the effect of the evidence would be, if admitted, to show that the court had no legal jurisdiction over the party. The record is equally conclusive as to such fact, as any other, when it appears on the record.

In *Spalding* v. *Chamberlin*, 12 Vt. 538, the plaintiff had been ousted on an execution in favor of the defendant, for which he brought an action for trespass and false imprisonment. The plaintiff sought to invalidate the judgment on which the execution issued, by showing that when the writ issued and was served, it was not signed by the justice who rendered the judgment, but by another, and that subsequently the name of the justice was erased, and it was signed by the justice who rendered the judgment. If these facts were true, then it was clear that the justice who rendered the judgment, had no rightful jurisdiction of the process, or to render a judgment thereon; but the evidence to show this was rejected on the ground that it contradicted the record, which recited that a writ was issued signed by the justice by whom the judgment was rendered.

So in *Beech* v. *Rich*, 18 Vt. 595, in an action of debt on a recognizance, the defendant offered to prove that he never appeared before the judge and entered into such recognizance, and that it was made without the knowledge or consent of the defendant. But the evidence was rejected on the ground that the record was conclusive and could not be impeached by evidence.

There is more analogy between the case of a recognizance and a judgment by confession, than between a confession judgment and one rendered in the ordinary way in an action pending between the parties.

It is claimed that the justice could have no legal jurisdiction to render a judgment by confession, unless the party appeared in person to make such confession, and we are not now disposed to think that he could, as was intimated in the case of *Shedd et al.* v. *Bank of Brattleboro*, 32 Vt. 709.

But the same is also true of a confession of a conditional indebtedness by way of recognizance, that if it was done without the knowledge or consent of the recognizor, it would be without lawful jurisdiction, and would be void.

In *Eastman & Paige* v. *Waterman*, 26 Vt. 494, an *audita querela* was brought to set aside the judgment of a justice of the peace. The judgment was confessedly irregular, and the plaintiffs were entitled to have it set aside, unless personal notice of the pendency of the suit had been given. The justice's record showed that such personal notice had been given. The plaintiffs offered to show that no such notice was given, but the evidence was rejected on the ground that the record could not be contradicted. Some previous cases in this State had intimated that in a suit brought to vacate a judgment, the record was not conclusive, but might be contradicted; but here it was held that the record was conclusive in such case even. It is certain that this is carrying the doctrine to its extremest length.

In *Barnard* v. *Flanders*, 12 Vt. 657, the defendant was sued for an alleged misconduct as a justice of the peace, and his record was held not only admissible, but conclusive, in his own favor, and that evidence was not admissible to contradict it.

In view of the principles established by the cases already cited, and many others of the same character in our reports, we deem it clear that the evidence offered was not admissible for the purpose of establishing any defence against the plaintiff's judgment so far as the defendant is concerned, nor by the subsequent attaching creditor as standing in the place of the defendant and asserting his right.

It was not claimed, nor was there any offer to prove, that the plaintiff had not a valid debt or claim against the defendant to the full extent of the judgment confessed, nor that it was done with any fraudulent purpose or design to create a claim to cover the defendant's property to keep it away from the creditor who defends this suit, or any other of the defendant's creditors. Standing upon his own peculiar right as a creditor, he has therefore no valid objection to to make, and if there were any technical irregularity in the plaintiff's judgment, not affecting the real existence and validity of the debt, it would not avail.

Judgment affirmed.

LOUISA C. WRIGHT v. THOMAS W. MCKEE.

Evidence. Pleading.

Evidence of general good character is not admissible as a defence in civil cases, except where the question of character is directly in issue and material to the amount of damages—as in slander and seduction—even though the plaintiff's testimony virtually charges the defendant with the crime of embezzlement.

If a count in trover against a carrier sets forth the business of the defendant, and his negligence and the loss thereby, it will be sufficient without setting forth his duty as carrier.

TROVER, with a count in trespass for a package of money.

On the trial the plaintiff filed the following new count by leave of the court:

"Now comes the plaintiff in the above entitled cause, and in a plea of the case declares and says that heretofore, to wit: on the 7th day of December, A. D. 1861, the defendant, who was a jobman in Montpelier, in said county, undertook safely, securely and promptly to deliver a certain package of money, the property of the plaintiff, from the residence of the plaintiff in said Montpelier, to one Rawsel R. Keith, in said Montpelier. And the plaintiff avers that the package was of great value, to wit: forty-four dollars in bank bills, and four dollars and eighty-six cents in specie, and all of the value of forty-eight dollars and eighty-six cents, which the defendant then and there received. Yet the defendant, not regarding his said duty, or undertaking as aforesaid, but contriving and intending to injure the plaintiff, did not and would not safely, or securely, or properly convey said package of the value aforesaid to said Keith as aforesaid, nor there deliver the same to the said Keith; but on the contrary thereof, the defendant so carelessly and negligently behaved and conducted himself in the premises that, by the gross negligence and carelessness and default of the defendant, the said package with its contents became and was wholly lost to the plaintiff,—to the damage," &c.

This count was filed by consent of counsel after the trial had commenced.

The case was tried by jury at the March Term, 1864, PECK, J., presiding, on the original and new count so filed, under the plea of not guilty.

The facts established by the evidence and the questions raised upon the evidence are set forth in the opinion of the court. Verdict for the plaintiff.

After verdict, and before judgment thereon, the defendant filed a motion in arrest, and on the hearing upon the motion insisted that the new count filed was in *assumpsit*, and that there was therefore a misjoinder, for which cause judgment should be arrested. The court over-ruled the motion and rendered judgment for the plaintiff on the verdict,—to which the defendant excepted.

The attention of the court was not brought to the question of this new count until the hearing on the motion in arrest.

On motion of the plaintiff the court adjudged that the cause of action arose upon the wilful and malicious act and neglect of the defendant, and that he ought to be confined in close jail. To this decision the defendant excepted.

Wing & Lund, for the defendant.

Redfield & Gleason, for the plaintiff.

ALDIS, J. The plaintiff delivered to the defendant a package of bank bills and silver—in value $48.86—to carry to Mr. Keith. From the time the defendant took it till he delivered it to Keith it was always in the defendant's possession. He claims to have delivered it to Keith just as he took it. When Keith opened the package there was nothing but waste paper in it. The conclusion seems irresistible that either the defendant stole the money from the package, or that the plaintiff did not put it in. The defendant and plaintiff differ upon one point. The plaintiff says she and the defendant *together* put the money into the package and tied it up with a string; the defendant says that after the money was counted and put into the package and before it was tied up, she took the package, went to another part of the room near a stand, and returned apparently in the act of tying up the package, and when she had tied it up dropped it into a bag in which he carried it to Keith. The defendant's version gives the plaintiff a chance to have slipped the money out of the package unobserved before she handed it to him. The plaintiff's excludes such supposition and fastens the embezzlement of the money on the defendant.

The material points of the evidence thus resting on the testimony

of the two parties and the plaintiff's testimony virtually charging the defendant with the crime of embezzlement—the defendant offered the testimony of witnesses to show that he sustained a good character for honesty and integrity. To this the plaintiff objected upon the ground that the action being trover for the money, the evidence was not admissible. The court excluded the evidence. The question we have here to consider is,—was there error in this ruling?

We are not aware that this point has ever been before this court.

In criminal cases the respondent is permitted to introduce evidence of this kind. In civil cases where the question of character is directly in issue and material as to the amount of damages—as in slander and seduction—it is admitted.

This we think is the extent to which it ought to be admitted in civil suits.

In criminal cases the law allows it to the respondent out of tenderness—to help him if it may in his necessity, as it gives him the benefit of every doubt. And even in criminal cases the law regards it of value only when the other evidence leaves the case in doubt, and general good character may be fairly invoked to rebut suspicious circumstances.

Many considerations concur in rejecting such evidence in civil cases.

Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed, and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced. It may then perhaps serve to turn the wavering scales. Very rarely can it be of substantial use in getting at the truth.

It is uncertain in its nature—both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbors,—especially if they are wealthy, influential, popular, or even only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partisanship, or other bias, of which they are unconscious; and in cases which are not quite clear they are apt to agree with the one

who first speaks to them on the subject, or to form their opinions upon the opinions of others.

The introduction of such evidence in civil causes, wherever character is assailed, would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that might be easily manufactured—is liable to abuse and if in common use in the courts, as likely to mislead as to guide aright. The authorities are quite unanimous in excluding such testimony. Many of the cases have been referred to by the counsel for the plaintiff.

In New York the early case of *Rusen* v. *Perry*, 3 Caines, 120, which favored the admission of such evidence has been overruled.

See *Gough et al.* v. *St. John*, 16 Wend. 645, where Judge COWEN cites many decisions upon the point.

In Connecticut in *Humphrey* v. *Humphrey*, 7 Conn. 116;—in Maine, 6 Greenleaf, 14;—in Pennsylvania 10 Serg. & Rawle, 55, the same doctrine is recognized.

In South Carolina the case of *Smets* v. *Plunket*, 1 Strobhart, 372, furnishes a well reasoned and satisfactory opinion in favor of the same rule.

So too are the elementary writers, 1 Greenleaf Ev. §§ 54 and 55. 1 Phil. Ev. 467, and Cowen & Hill's notes thereto; 1 Starkie's Ev. 306.

It is needless to cite the numerous cases in this country and in England. It is the settled rule of the common law.

2. It is claimed that the count last filed is in *assumpsit* and hence a misjoinder of counts.

It has been urged in argument that not only the business of the defendant as "a jobman" should be set up as it is, but that his duty resulting therefrom, to carry and deliver parcels in the village, should have been expressly alleged, and that without this the count cannot be in *case*. We have examined Mr. Chitty's forms and have been unable to find in any precedent in *case* any such express allegation of duty. The business of the carrier or inn-keeper, &c., is fully stated, and there the precedents stop,—not setting forth the duty, which is but an inference of law from the facts already stated.

The gist of the matter and the allegation which especially distinguishes the counts in *case* from those in *assumpsit* is the omission of the consideration and the averment of negligence. In these respects the count conforms to the precedents in *case*. The form in *Coggs* v. *Bernard* is like the one at bar.

3. The action being in tort the court might properly grant the certificate that the cause of action arose from the wilful and malicious act of the defendant.

Judgment affirmed.

GILBERT HUNTLEY *v.* LUTHER HENRY AND A. N. ATHERTON.

Pleading. Practice.

Where a writ is defective in not being signed by a public officer—a justice of the peace or clerk of the court—and the defendant appears and pleads to the merits, and makes no objection upon the ground that he was not duly summoned, he waives this ground of objection. Objection for such defect must be presented at the first opportunity.

ASSUMPSIT on a promissory note. Trial by court at the March Term, 1864, PECK, J., presiding. The writ was dated August 22d, 1862, on which service was accepted the same day. The suit was entered at the September Term, 1862, the death of the plaintiff suggested, an appearance entered for the defendants by counsel, and the case continued to March term, 1863, when E. W. Huntley, executor of the plaintiff, entered to prosecute at the March Term, 1863. The defendants filed their pleas, one plea being the general issue, and the other a plea that at the service of the plaintiff's writ there was no such person as the plaintiff in existence.

On the day the case was tried, and just before the trial, the defendants filed a motion to dismiss, for the reason that the writ was never signed by the clerk, or any magistrate, or other officer. The court refused to entertain the motion or dismiss the action, on the ground that the time that had elapsed since the cause was entered, in connection with the pleadings and other proceedings in the case, was

a waiver of that objection to the writ, and dismissed the motion, and proceeded to try the case upon the other pleadings in the cause, and rendered judgment for the plaintiff. To the decision of the court upon the motion to dismiss the defendants excepted.

L. Henry and *Wing & Lund*, for the defendants.

The statute prescribes how all writs returnable to the county court shall be signed. G. S. 289 § 3.

The writ is the foundation of the whole record, and if there is no writ, there is nothing upon which to base a judgment and record.

Is this a defect that would be waived by continuance and pleading? We insist that it is not. *Bailey* v. *Smith*, 3 Fairfield, 196; *Case* v. *Humphrey*, 6 Conn. 130; *Blodgett* v. *Brattleboro*, 28 Vt. 695.

Had the motion been made at the first term and within the rule, the writ could not have been amended, because it is void. *Brace* v. *Squire & Robinson*, 2 D. Chip. 49; *Dolbear* v. *Hancock*, 19 Vt. 388; *Wood* v. *Hill*, 5 N. H. 229; *Williams* v. *Van Meter*, 19 Ill. 293; *Dearborn* v. *Twist*, 6 N. H. 44; *Hutchins* v. *Edson*, 1 N. H. 139; *Hall* v. *Jones*, 9 Pick. 446; *Stayton* v. *Newcomber*, 1 Eng. (Ark.) 451.

In this case the court have no jurisdiction by process—nor of the process.

If the court have no jurisdiction of the process, it can do no legal act in the cause. *Case* v. *Humphrey*, 6 Conn. 130, before cited; *Graman* v. *Raymond et al.*, 1 Conn. 39.

Paul Dillingham, for the plaintiff, cited in addition to cases cited in the opinion of the court, *Jennison et al.* v. *Hapgood*, 2 Aik. 31; *Pollard* v. *Wilder*, 17 Vt. 48; *Wheelock* v. *Sears*, 19 Vt. 559; *Simonds* v. *Parker*, 1 Met. 508.

ALDIS, J. The signature of a public officer—a justice of the peace or clerk of court—to a writ summoning a party to appear in court, is required, in order that the party thus summoned may know that he is required to appear by authority of law,—and that the sheriff or constable serving the process may have the authority of law for the performance of his duty. The whole object of the process is to secure the appearance of the party in court, and that accomplished the function of the process is performed.

If there be error or irregularity in the process, the party upon whom it is served may appear and by plea or motion abate the writ. There are irregularities or defects in the process of so serious a nature that he is not required even to appear and a judgment by default would be void. But by appearing and answering to the declation upon its merits most of such defects are waived. Again there may be errors in the process of such a character that they are wholly incurable, affecting the jurisdiction of the court upon the subject matter of the process, and which the appearance of the party and his pleading to the merits even will not be deemed to waive and cannot cure.

This subject has been recently very fully and ably considered by Judge BELL in the case of *The State* v. *Richmond*, 6 Foster, 232; and his opinion abounds with ample illustrations of these different classes of defects.

In speaking of those defects in process which affect the jurisdiction of a court through want of due service of process or of notice to the party rendering the proceeding void he says:—"they are void not absolutely or incurably, but void only till they are confirmed. The party who has not been duly summoned is always and everywhere understood to waive his exception if he appears and suffers a general continuance or pleads in bar of the action, or in any way submits his case to the judgment of the court without at once making his objection at the earliest opportunity."

It is claimed that the omission of the signature of the officer to the writ makes the process void, destroys the jurisdiction of the court.

But 1st. The statute does not enact that for such defect the process shall be void or that the court shall not have jurisdiction.

2d. The object of the writ being simply by authority of law to call the party into court and apprise him of the complaint to which he is to answer (wherein we differ from the courts of common law and most of our sister states, in which the declaration does not issue with the writ,) it is quite obvious that if the party do appear and plead to the merits and make no objection upon the ground that he was not duly summoned, he must be considered as waiving this ground of objection. The objection is in substance, merely *dilatory*,

and therefore if urged at all should be presented at the first opportunity.

The jurisdiction of the court is ample, when the subject matter of the controversy is confided to it by law and is duly set forth in the pleadings and when the parties either upon summons or voluntarily appear and submit their case to the decision of the court. It does not depend upon the writ of summons.

The antecedent process is only to bring them into court. If without it they appear voluntarily and proceed to present to the court their claims and defences in due form of law, taking no exception to the want of antecedent process, they waive the irregularity.

Anciently in courts of common law a complaint in trespass was first filed in court and then a precept in the nature of an attachment issued against the defendant.

If the process be defective or irregular in point of form, or in the direction, service or return, the defendant may move to quash it. But this he should do as early as possible. Tidd in his Practice, p. 434, says:—if the defendant either proceed himself after discovering the irregularity, or lie by and suffer the other party to proceed, the court will not assist him. Tidd 90, 434; 6 Vt. 509; 17 Vt. 532; 1 Aik. 380.

Swift in his Digest, p. 610, expressly mentions as one ground of *abatement* merely, that "the writ is not signed by proper authority;" classing it with other defects of form.

We have been referred to the case of *Wood* v. *Hill*, 5 N. H. 229, to show that a writ returnable upon a day out of term is *void*. But this was upon a motion to quash and the writ abated. In what sense it was *void* will appear from the more recent examination of the subject in that state by Judge BELL in *The State* v. *Richmond*, in 6 Foster. In *Blodgett* v. *Brattleboro*, 6 Vt. 695, the same defect was regarded as merely matter of abatement.

The case in the 6 Conn. 130, *Case* v. *Humphrey*, only shows that where one not authorized to make service serves a writ and the defendant does not appear and there is a judgment by default, such judgment is extra-judicial and void.

But if the party had appeared and made no objection to the ser-

vice and contested the case upon its merits can it be said that the judgment then would have been void? Clearly not. In *Holmes* v. *Essex*, 6 Vt. 47, where a sheriff served a writ in which he was interested, the court held that the defect must be taken by plea in abatement, and that *audita querela* to set aside the judgment would not lie.

Judgment affirmed.

JOSEPH A. WING, *Executor of* WILLIAM P. BRIGGS, *v.* AMOS B. COOPER, ROBERT RUSSELL, JOSEPH WHIPPLE, ROLLA GLEASON, LORENZO WHITCOMB AND HENRY A. HODGES.*

[IN CHANCERY.]

Mortgage. Power of Sale. Conditional Sale. Evidence. Parties.

The deed and bond in question in the present case are held to have the effect of a security in the nature of a mortgage, to which the right of redemption attaches; and this right cannot be waived by agreement.

Parol evidence is not admissible to show that an instrument on its face a mortgage was intended by the parties to operate as a conditional sale, or to turn the real transaction into one of a different character.

A power of sale in a mortgage is in practice unusual if not unknown in this state, and ought not to be recognized in any case unless conveyed by an express grant and in clear and explicit terms.

Gleason, being liable to an accounting, was properly joined as a party defendant, and even if not, it was apparent on the bill itself, and the objection, if not made by demurrer to the bill or in the answer, should be considered as waived and as coming too late when made at the hearing.

APPEAL FROM CHANCERY. The facts are sufficiently stated in the opinion of the court. At the March Term, 1860, ALDIS, Ch., the court of chancery decreed that the bill be dismissed with costs. This decree was upon a full hearing of the case, but was *strictly pro forma* and made to enable the parties to have a decision in the supreme

* This case was argued at the August Terms, Washington county, 1860 and 1861, and reargued at the General Term, November, 1863, and the opinion delivered at the present term.

court, before incurring the delay and expense of an accounting. Appeal by the orator.

J. A. Wing, for the orator.

1. Did the deed and bond of the 8th or 9th of January, 1853, constitute a mortgage? If so, it is still a mortgage, and the orator has a right to redeem. *French* v. *Sturtevant*, 8 Greenleaf, 246, (read from page 250, which shows the difference between common law and the statutes of Maine and Mass.)

2. The literal definition of mortgage, as its name imports, is "dead pledge," but practically a security for the performance of some act, or the payment of some debt. *Montgomery* v. *Chadwick*, 7 Clark's, Iowa, 114.

3. No particular form of words is necessary to constitute a mortgage. The great question in equity is, what did the parties intend—what was the agreement upon which their minds met? *Oldham* v. *Hully*, 2 J. J. Marshall, 113.

4. Both bonds speak of indemnity and security, and of the obligors' putting no impediment in the way of the orator's redeeming;—all which terms are inconsistent with any contract but a mortgage. *Baxter* v. *Child*, 39 Maine, 110; *Waters* v. *Randall*, 6 Met. 879; 4 Kent's Com. 142; *Hughes* v. *Edward*, 9 Wheat. 489; *Hickok* v. *Low*, 10 California, 197, read 209 and 210; *Rutborgh* v. *Ludwich*, 31 Penn. State R., 131, (read pages 138 and 139.)

5. There was no discharge of the debt at the time of the execution of the papers. The bond was therefore what it purports to be, security and indemnity, and not a sale with a right of redemption.

It therefore follows that the right to redeem is inseparably connected with it, and any agreement to prevent a redemption is void. 2 Story's Equity, § 1019, and cases there cited; 5 Gray, (Mass.) 505; *Bailey* v. *Bailey*, *Adm'r*, 2 John. Ch. 30; *Holridge* v. *Gillipsie*, 22 Penn. State R. 171; *Wood* v. *Willard*, 4 Kent. 143; *Baxter* v. *Child & wife*, 39 Maine, 110; *Catlin* v. *Chittenden & Co.*, Bray. 168; *Lee* v. *Evans*, 8 Cal. 424; *Campbell* v. *Worthington*, 6 Vt. 448; *Baxter* v. *Willey*, 9 Vt. 276; *Henry* v. *Davis*, 7 Johns. Ch. 40. See also *Wright* v. *Bates & Niles*, 13 Vt. 341; *Hyndman* v. *Hyndman*, 19 Vt. 9.

6. If the writings import a mortgage, parol testimony cannot be

admitted to vary them. *Bailey* v. *Bailey, Adm'r*, 5 Gray, 505; *Wood* v. *Wallace*, 22 Penn. State R. 171; 9 Vt. 276.

7. Was Rolla Gleason properly made a party to the bill?

8. The orator had no right under the bond to call the fund out of the hands of Gleason; it belonged to the obligors, and of its amount the orator could know nothing without discovery. Hence the orator had the right, and it was his duty, (the obligors neglecting,) to compel a discovery of the amount, and where the fund was. *McConnell* v. *McConnell*, 11 Vt. 291; *Cato* v. *Early*, 2 Stuart, 214, (cited 2 U. S. E. Digest, 436, §§ 544–543;) *Crambs* v. *Demming*, 7 Cowen, 387; *Delaware* v. *Everston*, 1 Paige, 431, (cited 2 U. S. Dig. 437, § 580; 2 U. S. E. Dig. 434, § 496;) *Cadwell* v. *Taggart*, 4 Peters, 190; *West* v. *Randall*, 2 Mason, 181; *Smith* v. *Rogers*, 1 Stewart & Port. 307, (cited U. S. Dig. 436, § 542;) *Sanborn* v. *Kittredge et al.*, 20 Vt. 632; *Wetter* v. *Arnott*, 3 English, 67, (cited 9 U. S. Dig. 156, §§ 42–43;) 4 Gratt. 270, (cited 10 U. S. D. 185, § 589;) 2 Strobb. E. 262, (cited 10 U. S. Dig. 174, § 360;) *Carey* v. *Hoxie*, 11 Greer, 645, (cited 14 U. S. Dig. 230, § 398 *et seq.*;) *Gilman* v. *Johnson*, 14 Greer, 683, (cited 14 U. S. Dig. 230, § 405;) *Flagg* v. *Mason*, 2 Sumner, 437.

9. It would be impossible, therefore, for the court to make an equitable adjustment of all the matters, unless Gleason is a party to this bill. *First Con. Soc. in Raynham*, 23 Pick. 148; *Executors of Brashur* v. *Van Cortland*, 2 Johns. Ch. 246; *Joslyn* v. *Hamilton*, 7 Ala. 362, (cited 2 U. S. E. D. 438, § 609;) *Cummings* v. *Maynard*, 11 Paige, 596; *Day* v. *Cummings*, 19 Vt. 469; *Hartford* v. *Chipman*, 21 Conn. 488.

T. P. Redfield and *Dillingham & Durant*, for the defendants.

The relation between the parties was not that of mortgagor and mortgagee.

From the relation of the parties, and the whole scope and tenor of the bond, it is obvious that the contract was not a mortgage, but simply a right to re-purchase by reimbursing the defendants what they should be compelled to pay, in order to protect the title for the term of three years.

A *mortgage* is collateral to, and an *incident* of, some *debt*; that relation implies *mutual rights* and *duties*,

There was no debt which the orator *owed* the defendants, which is the true criterion of a mortgage.

If there be a loan or antecedent debt, and the conveyance do not extinguish the debt, but is *collateral* to, and as a security for the debt, then it is a mortgage, otherwise it is not. 2 Bouvier's Dictionary, 179; *Hicks* v. *Hicks & Morris*, 5 Gill & Johns. 75—opinion of Blanch, Chancellor; Chitty's Eq. Dig. 1432, § 6, and cases there cited; 2 Edw. Ch. R. 138; *Holmes* v. *Grant*, 8 Paige, 243, Walworth, Chancellor; *Glover* v. *Paine*, 19 Wend. 518; *Sweetland* v. *Sweetland*, 3 Mich. 482; *Conway's Executors* v. *Alexander*, 2 Curtis, U. S. R. 516.

The orator's *bond* expressly provides that he may reimburse and redeem, if he *chooses*.

The orator had the right to re-purchase within three years, but there was no *duty* upon the orator; nor was there a subsisting debt which the defendants could enforce.

In *Goodman* v. *Grierson*, 2 B. & B. 274, Lord MANNERS says: "The fair criterion by which to determine whether a *deed* be a *mortgage* or not, is by asking, were the remedies *mutual* and *reciprocal*, and has the grantee all the remedies to which the grantor is entitled?"

This criterion is affirmed by the authorities quoted above. See also *Henry* v. *Bell*, 5 Vt. 393.

The terms "redeem" and "re-purchase" are synonymous. 2 Edw. Ch. 138.

a. The *express* provision in the bond, that the defendants *shall not sell within three years*, is, by a well admitted rule of construction, an *implied authority to sell* after the limitation expires.

If the said Briggs shall pay or offer to pay within the three years, "then the defendants shall re-deed," if otherwise, "then they shall hold the same as *their own*."

Expressio unius exclusio alterius.

II. Parol evidence is admissible to show the understanding of the parties, and when the intent is shown the decree will be in accordance with it. *Conway, Ex.*, v. *Alexander*, 7 Cranch, 218; Leading Cases in Equity, 3 vol. 416–417; *Flagg* v. *Mann*, 14 Pick. 467; Hilliard on Real Property, 401, § 42; Fonb. Eq. 472—note; *Camp-*

bell v. *Worthington*, 6 Vt. 448; *Lowry* v. *Adams*, 22 Vt. 160; 18 Peters, 89; 2 Freeman, 70–86, 144, 153; 1 Vernon, 191, 268; 1 Forrest, 62; Selwyn's Cases in Chancery, 10; 2 Chan. Rep. 275; 19 Vesey, Jr., 412; 4 Sch. & Lef. 373; *Eiland* v. *Rudford*, 7 Alabama, 724; *Hicks* v. *Hicks & Morris*, 5 Gill & Johnson, 75; *Russell* v. *Southard et al.*, 12 Howard, 139.

If the orator then understood it as he *now* claims it, as constituting a mortgage, he is estopped from setting it up as a mortgage, for he proclaimed, after writing the bond and reading portions of it, and before the defendants would sign it, that it could not be so construed. See *Strong* v. *Ellsworth*, 26 Vt 366; 1 Hilliard on Real Property, 425, § 43; 1 Story's Equity, § 134—note 3.

To enforce it now would be against equity. *Cathcart* v. *Robinson*, 4 Peters, 264; 2 Story's Equity, 769, note and cases cited; *Galt* v. *Johnson*, 9 Alabama, 151.

We submit that in any event the defendants had the *power* and right to sell. See Hill on Trustees, 476. And with them there was a *necessity* to do so And when nearly eight years have elapsed, and neither Briggs nor his *representative*—before or since the bill was filed—has "offered to reimburse," is there a case that calls for or that will warrant a court of equity to overturn the *title* of the purchaser and institute another chapter of lawsuits upon the covenants in the defendants' deed to Whitcomb?

KELLOGG, J. On the 20th of September, 1851, the orator, William P. Briggs, now deceased, by whom this suit was originally commenced, and in whose right it is now prosecuted by his executor, was indebted to Joseph Reed of Montpelier on two promissory notes, both of which were signed by him, and one of which was signed by the defendants Cooper, Russell, and Whipple as his sureties, and the other of which was signed by Ransom Jones as his surety. Both of these notes had then been over due for several years. There was then due for principal and interest on the note signed by the defendants Cooper, Russell, and Whipple as sureties a sum exceeding twenty-one hundred dollars, and on the note signed by Jones as surety a sum exceeding three hundred dollars. At the same time, Briggs was indebted to the National Life Insurance Company at Montpelier on another note which was signed by him and also by the defendants,

Russell and Whipple and Saul Bishop and Merrill Fellows as his sureties, on which there was then due for principal and interest about eleven hundred dollars, and this note also had been for some time over due. After the defendants Cooper, Russell, and Whipple became sureties for Briggs on the note to Joseph Reed above mentioned or on the debt represented by that note, Briggs and one Lyman Field, who was originally a principal with the said Briggs on the said debt, executed to them a quit-claim deed of certain lands in the town of Worcester, or of an interest or share therein,—which deed, though absolute in form, was intended and understood by the parties thereto to be a security and indemnity to the grantees named therein for or on account of their liability as sureties as above stated. The land conveyed by this deed, though numbering many hundred acres, was wild and uncultivated, and of uncertain value. Suits were commenced on the 20th of September, 1851, or about that time, by writs returnable to the Washington County Court, on the notes above mentioned, by the payees against the makers of the same respectively, and the writs in the said suits having been delivered to the defendant Gleason, who was then a deputy sheriff of the county of Chittenden, for service, he attached thereon all the personal property of Briggs which was subject to attachment, and also his real estate, including the home farm, on which he then lived, situated in the town of Richmond. These attachments were made on the 22d of September, 1851,—that in favor of the Life Insurance Company being the first in priority,—and all of the attachments on the personal property were subject to the lien of certain attachments on writs against Briggs before that time made by Gleason as deputy sheriff, and of certain executions against Briggs which Gleason, as deputy sheriff, then held in his hands for collection, and which he had levied on the same property. The personal property so attached, consisted of a large number of cows, young cattle, oxen, horses, and the hay, grain in the straw, and other farm produce on the farm of Briggs, and other articles. On the 13th of November, 1851, which was before the return of the writs in favor of Mr. Reed and the Life Insurance Company and while those writs were still in Gleason's hands, the cows and other stock which had been attached on these writs as above mentioned, were sold by Gleason, with the consent in writing of Briggs, and the

proceeds of the sales, amounting to about one thousand dollars, were received by Gleason. The writs in favor of the Life Insurance Company and Mr. Reed were duly returned and entered in court, and judgments were rendered in those suits against the defendants therein respectively in the county court for Washington county at the March Term, 1852, and executions on these judgments were issued and delivered to Gleason as deputy sheriff for levy and collection. On the 26th of April, 1852, while holding these executions in his hands, Gleason sold at public auction the residue then remaining of the personal property which had been attached as above stated, but the executions were returned unsatisfied, and *alias* executions were subsequently issued on each of the three judgments, which were also delivered to Gleason as deputy sheriff to levy. These *alias* executions were levied by Gleason on the home farm of Briggs in Richmond, or on the equity of redemption of Briggs in that farm,—the two executions in favor of Mr. Reed being levied in July, 1852, and the execution in favor of the Life Insurance Company being levied in August, 1852. These levies were in fact made for the benefit of the sureties of Briggs on the notes included in the respective judgments on which the executions were issued, and the interest of the execution creditors in these levies respectively was subsequently duly conveyed to the defendant Hodges, who held the same for the benefit of the sureties. At the time when these levies were made, the premises levied upon were subject to the incumbrance of a mortgage deed executed by Briggs on the 6th of August, 1850, to one George Bowland of Boston, for the benefit of Thomas Reed of Montpelier, to secure the payment of a note for five thousand dollars with interest thereon annually. On the 8th of January, 1853, which was a very few days before the expiration of the time allowed by statute for the redemption of the premises from the levies above mentioned, Briggs and the defendants Cooper, Russell, and Whipple, after some preliminary negotiation, entered into an agreement which was put in writing, and consisted of a quit-claim deed of that date executed by Briggs to these defendants, conveying the land referred to and included in these levies, and a bond in the penal sum of fifteen thousand dollars of the same date executed by them to Briggs. The whole controversy in this case depends mainly on the effect which

shall be given to the provisions of this bond. The present suit was commenced by Briggs in his life-time and is now since his decease prosecuted by his executor, on the claim that this deed and bond, taken together, created the relation of mortgagor and mortgagees between himself and these defendants, and that he, as mortgagor, was entitled to redeem the land so conveyed to the defendants from the claims which they were properly entitled to assert under the conditions of the bond as incumbrances upon the land. The orator's bill is in substance a bill to redeem this alleged mortgage, and this suit was commenced on the 27th of August, 1856.

No question is made by these defendants that a bond was executed by them to Briggs at the time of the execution of his quit-claim deed to them; but they claim that the bond presented by him as the bond executed by them to him on that occasion is spurious and was forged by him, and that another bond, a copy of which is annexed to the answer of Whipple, was the true and only bond which was ever at any time executed by them to him in respect to the land conveyed by his deed to them. The bitter and excited feelings which are apparent upon the bill, answers, and testimony in this case are to be attributed in a large measure to the allegations on the part of the defendants in respect to the genuineness of the instrument presented by Briggs as the true bond executed to him by them, and to the positive character of the issue made by them on that point. The testimony in respect to the question as to which of the bonds was the true bond does not leave the subject free from mystery or doubt, but our examination of the testimony, and particularly of the instrument which is sought to be impeached, impresses us with the belief that the preponderance is in favor of the claim of Briggs and of the genuineness of the bond presented by him. There is no doubt that the signatures of Cooper, Russell, and Whipple to the bond presented by Briggs are genuine, and, in fact, they are admitted so to be by each of these defendants in their testimony. The genuineness of the signatures being established, the natural and fair presumption would be that the instrument to which those signatures were subscribed was itself genuine, and the evidence on the part of the defendants fails to satisfy us that this presumption is not well founded. We do not discover any substantial difference between the provisions of the one

bond and those of the other, so far as they affect the character of the relations between Briggs and these defendants, or the general character of either instrument, and we regard the same reason or ground of decision as applicable to both alike.

It being settled that the bond presented by Briggs is a genuine and valid instrument, we proceed to consider its terms and effect. In the condition of the bond it is stated *inter alia*, after reciting the execution of the quit-claim deed from Briggs to Cooper, Russell, and Whipple, that they, Cooper, Russell, and Whipple, have agreed with Briggs to pay the debt and judgment in favor of Mr. Reed on which they were sureties as above stated "to the said Reed, and the intent of the said deed is to indemnify and save harmless the said Cooper, Russell, and Whipple for such payment, and for the payment or redemption of two other levies upon the lands of the said Briggs,"— referring to and describing the levy in favor of Mr. Reed on his execution against Briggs and Ransom Jones, and the levy on the execution in favor of the Life Insurance Company, already mentioned,— "and this deed is to be indemnity and security in addition to the security of the lands of the said Briggs in the town of Worcester, which are and have long been in the hands of the said Cooper, Russell, and Whipple as security for the said Reed debt." Then follow provisions in respect to the leasing of the land by Cooper, Russell, and Whipple for a period not exceeding three years from the 1st of April, 1853, and the application of the rents and profits, over and above taxes and necessary repairs, upon these debts and judgments and upon the mortgage to Bowland, first to keep down the interest thereon, and then to apply the balance in reduction of the debt due to Mr. Reed. The bond further provides that Cooper, Russell, and Whipple shall not sell the land, or any portion of it, during this period of three years without the consent in writing of Briggs, and that they shall purchase in and hold the title under all of the levies referred to within the said period of three years, and make the same secure to them for the benefit of Briggs, and shall prevent the title from being lost by a foreclosure of the mortgage to Bowland during the same period, so "that Briggs may redeem if he chooses so to do." It is also provided that, "if at the end of the said three years, or at any time during the said period, Briggs shall pay, or

offer to pay in money the amount of the two debts of the said Reed then remaining, and what may remain of the debt or levy of the Life Insurance Company which the personal property attached thereon shall be found insufficient to pay, the said Cooper, Russell, and Whipple shall forthwith re-deed the said land to the said Briggs, subject to any lease they may have given to any tenant of the same." * * * "And, if at the end of the said three years, the said Cooper, Russell, and Whipple shall not have been reimbursed, or offered to be reimbursed, in money for the balance of the debts aforesaid which may remain due and unpaid in their hands, then they are to hold said lands as their own property free and clear of all claim by the said Briggs, they putting no impediment or obstacle in the way of the said Briggs paying said debts and redeeming the said lands." These, in substance, are the provisions of the bond, though not stated in precisely the same consecutive order in which they appear in that instrument.

It is a familiar principle that when several instruments are executed at one and the same time, between the same parties, and upon the same subject matter, they are to be treated as one instrument and construed together. *Reed* v. *Field & Briggs*, 15 Vt. 672; *Strong* v. *Barnes*, 11 Vt. 221; *Raymond* v. *Roberts*, 2 Aik. 204. The deed from Briggs to Cooper, Russell, and Whipple, and the bond executed by them to Briggs are accordingly to be construed as they would have been if the substance of the bond had been incorporated into the deed itself, or as if both constituted but a single instrument. It is claimed on the part of the orator that the deed and bond constituted a conveyance in mortgage, while, on the part of the defendants, it is insisted that the transaction was in fact a conditional sale, or a sale with an agreement for a repurchase within a given time. To ascertain the intent of the parties in entering into a contract or agreement, in a case where that intent upon the face of the instrument is doubtful, or the language used by them will admit of more than one interpretation, the court will look at the situation and motives of the parties making the contract or agreement, its subject matter, and the object to be attained by it, and will allow these circumstances to be shown by parol evidence notwithstanding the contract itself is in writing. *Lowry et al.* v. *Adams*, 22 Vt. 160. But we discover no

ambiguity in the terms of this bond, and no necessity to resort to parol evidence of extraneous facts for a proper understanding of its provisions; and, in such cases, instruments of this character should always be construed according to the intentions of the parties, to be derived from the instrument itself. *Graham* v. *Stevens*, 34 Vt. 166. It is apparent that the distinct and primary object of the bond was to assist Briggs by giving him further time to relieve the premises conveyed by the deed from the incumbrances to which those premises were then subject. A mortgage is defined to be a conveyance of an estate, by way of pledge, to secure a debt or the performance of some act, such as the payment of money or the furnishing of an indemnity, and to become void on payment or performance agreeably to the prescribed condition. 4 Kent's Com. 133; 1 Washburn on Real Property, 475. In 2 Story's Equity Jurisprudence, § 1018, it is said that "in determining what constitutes a mortgage, the particular form or words of the conveyance are unimportant, and it may be laid down as a general rule, subject to few exceptions, that whenever a conveyance, assignment, or other instrument, transferring an estate is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or from any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations therein expressed." And in 4 Kent's Commentaries, 144, *note*, it is said that if it be doubtful whether a mortgage or a conditional sale was intended, courts of equity always incline to treat the transaction as a mortgage, as more benign in its operation. The condition of the bond has all the elements of a condition of defeasance. It was executed, not as a subsequent and independent agreement, but at the same time with the deed; and it shows very distinctly that it was contemplated by the obligors as well as by Briggs that Briggs should redeem the estate conveyed from the incumbrances then existing upon it. The terms used,—such as "*indemnity and security in addition to the security* of the lands of the said Briggs in the town of Worcester," etc., * * "so that the said Briggs may *redeem* the same if he chooses so to do,"—"re-imburse,"—"paying said *debts* and *redeeming* said lands,"—all are such as are strongly characteristic of a mortgage, and very

plainly imply that there was an indebtedness on the part of Briggs which was intended to be kept on foot, and that the estate conveyed by the deed was taken for the security of that indebtedness. Cooper, Russell, and Whipple were the sureties of Briggs, and if the title of Briggs to the land levied on had failed, their liability as his sureties would have continued, and they would have had a remedy against Briggs for any payment made by them on the debt. There was no extinguishment by them of any debt against Briggs *in presenti*, and no agreement on their part to pay the note and mortgage to Bowland or to indemnify Briggs against any suit or claim on that note. The land conveyed to them by Briggs was to be held by them as "indemnity and security *in addition* to the security of the" Worcester lands; and it is not questioned that the Worcester lands were held by them as a security in the nature of a mortgage. It is said, on the part of the defendants, that there was no debt existing from Briggs to them; but there was a debt which was capable of being enforced against the property which Briggs conveyed to them, and the absence of any personal liability on the part of Briggs to pay the money advanced or to be advanced by them in satisfaction of the levies is not a conclusive test whether the conveyance was intended to be absolute, or a security merely. It was not necessary that there should be a liability on the part of Briggs to pay, as well as on the part of his grantees to release or re-convey on being paid, to constitute the transaction a mortgage; yet the want of this mutuality is proper to be considered in determining whether the transaction was a mortgage or not, though it is not of itself decisive. If a debt capable of being enforced in any way against either the person or the property of Briggs was purposely kept on foot, and if the conveyance by him was intended to secure the payment of that debt, the transaction was in fact a mortgage, and the estate was defeasible and redeemable, although there was no covenant or other personal obligation on his part to pay the money. *Flagg* v. *Mann*, 2 Sumn. 584; *Brown* v. *Dewey*, 1 Sandf. Ch. R. 56; 1 Washburn on Real Property, 481; *Graham* v. *Stevens*, *ubi supra*. If the land conveyed by Briggs was to be held by Cooper, Russell, and Whipple as "*indemnity* and *security*," it is apparent that there was, in the contemplation of the parties to the deed and bond an existing *debt*, for which the land was to be held as

such indemnity and security, and that the relation of principal and surety between Briggs and these defendants was expected still to continue. This view of the case is strengthened by the consideration that the transaction lacks the leading and characteristic element of a *sale;* as no sum or equivalent was agreed upon by the parties to the deed as a *price* for property sold by the grantor and purchased by the grantees. Although these defendants insist that the transaction was a *sale* with a condition of re-purchase, yet neither of them, in answer or in testimony, makes any mention of a *price* as for a sale of the farm agreed upon between Briggs and themselves except Whipple, who, in his testimony (answer to 94th interrogatory,) says that "the Bowland mortgage was a part of the price of the farm." But Whipple, in his answer to the orator's bill says that the deed and bond contain the whole agreement between Briggs and Cooper, Russell, and himself, and this statement is not varied by the answers of the other defendants. We think that it is apparent, on the face of the deed and bond, that the premises conveyed by the deed were conveyed to be held as a security for a debt which was to be kept on foot, and that no debt against Briggs was extinguished or discharged in the present tense, at the time these instruments were executed, or was intended so to be. The two instruments must consequently be treated, when taken together, as creating a security in the nature of a mortgage.

If the transaction between the parties was in fact a mortgage, the right of redemption attached as an inseparable incident, created by law, which could not be waived by agreement. The principle has been uniformly asserted and applied in such cases that "if once a mortgage, always a mortgage," and it cannot be made otherwise by any agreement of the parties, made at the time of the execution of the deed of conveyance, or upon any future contingency whatever. *Baxter* v. *Willey*, 9 Vt. 276; *Wright* v. *Bates*, 13 Vt. 341; *Catlin* v. *Chittenden & Co.*, Brayton's Rep. 163; 4 Kent's Com. 143; 1 Washburn on Real Property, 496. In *Bayley* v. *Bayley, Adm'r*, 5 Gray, 505, it is said by SHAW, Ch. J., that "though it be ever so strongly expressed that the estate shall be absolute if the money is not paid at the day fixed, such stipulation would be void," and that "it does not depend upon the intent of the parties; because it is an intent

contrary to the rules of law, which the law will not carry into effect."

It is insisted by the defendants that even if the deed and bond, when construed by themselves and without reference to extrinsic facts, are to be treated as creating a security in the nature of a mortgage, parol proof is admissible to show the actual understanding of the parties in respect to what they agreed to do, and how they regarded what they had done, and that when this is shown, it will be decisive in respect to the legal character of the instrument, and the decree will be in accordance with their intent. A deed, absolute on its face, may, in a court of equity, under certain circumstances, and especially as between the parties to it, be shown by parol evidence to have been given as a mortgage. *Baxter* v. *Willey*, and *Wright* v. *Bates & Niles*, *ubi supra*; *Conner* v. *Chase et al.*, 15 Vt. 764. And parol evidence has been received to show fraud or a mistake of material facts in cases in which, by reason of the fraud or mistake, it would be unconscientious to enforce the agreement according to its written terms, and also to explain the technical or local meaning of particular words or terms, or to explain a latent ambiguity in a written instrument. But as a general rule, where parties make a written contract or agreement, their declarations that it shall not have the legal effect which its terms import, though made at the time of its execution, are not admissible. If the deed and bond in this case were in fact a mortgage, the agreement that the claim of Briggs should cease at the expiration of three years would not alter its real character, for such an agreement is no more than the common condition of a mortgage deed. In *Kunkle* v. *Wolfersberger*, 6 Watts, (Penn.) 126, it is said that a formal conveyance may certainly be shown to be a mortgage by extrinsic proof, while a formal mortgage may not be shown to be a conditional sale by the same means," and the reason of this rule is stated by GIBSON, Ch. J., to be that "in the one case, such proof raises *an equity consistent with the writing*, while in the other, it would contradict the writing. In *Colwell* v. *Woods*, 3 Watts, 197, it was determined that a conveyance and simultaneous covenant to re-convey on repayment of the purchase money before a given day must be construed to be a mortgage, "though it appear by parol that the parties did not intend it to be so." *Brown*

v. *Nickle*, 6 Barr, 391. In *Woods* v. *Wallace*, 22 Penn. 171, it was again held that a written mortgage cannot be converted by parol evidence into a conditional sale, and the reason of this rule is very fully considered in the opinion delivered in that case by LEWIS, Ch. J., which may be referred to as a satisfactory exposition of the law of the subject. We have been unable to find any case which is in conflict with the rule that if a deed clearly appears upon its face to be a mortgage, parol evidence is not admissible to show that it was a conditional sale only, and not a mortgage, or to turn the real transaction into one of a different character. With this view of the proper rule of evidence applicable to the subject, we think that the testimony offered by the defendants to show that this deed and bond were not understood or intended by the parties as constituting a mortgage must be treated as inadmissible for that purpose, although we might regard it, if it was proper and admissible testimony, as being amply sufficient to establish all that is claimed on the part of the defendants in respect to the intent of the parties to those instruments.

The next inquiry which the case suggests is, whether the deed and bond, taken together, should not be treated as a mortgage conferring upon the mortgagees a power of sale. The whole theory of the defence, so far as it gives a character to these instruments, proceeds on the ground that the real character of the transaction was that of a sale upon a condition and not that of a mortgage. It is not claimed that there is any *express* power of sale contained in these instruments, but it is insisted that the provision in the condition of the bond that the obligors shall not sell any part of the premises conveyed by the deed within the period of three years from the 1st of April, 1856, without the consent in writing of Briggs, as before mentioned, is an *implied* authority to sell after that time. The maxim, *expressio unius est exclusio alterius* must be inverted, before it can be considered applicable to the support of this claim. A power of sale given by a mortgage deed is not an ordinary power, and as between the mortgagor and mortgagee, it should be strictly construed. In this state, it is in practice unusual if not unknown. We have no statute regulating its exercise, and a sale under it might be made without the concurrence of the mortgagor, and even without notice to him. It is

too important a power to rest upon implication and local reasoning, and ought not, as we think, to be recognized in any case unless it is conveyed by an express grant and in clear and explicit terms.

It necessarily results from these conclusions that the deed and bond must be allowed to have the effect of a security in the nature of a mortgage, and that these instruments, taken together, vested in Briggs the equity of redemption which is asserted and claimed in his bill of complaint. On the 7th of April, 1856, the defendant Whitcomb purchased of the defendants Cooper, Russell, and Whipple the premises conveyed by the deed for the price of ten thousand seven hundred and fifty dollars; but, when he made this purchase, he had full notice of the claim of Briggs in respect to the real character of the conveyance under which those defendants derived and held their title to the premises. The evidence upon this point is full, clear and uncontroverted. Being a purchaser with notice, he acquired by his purchase no other or greater rights than those which the defendants Cooper, Russell and Whipple could, at the time of the purchase, set up against Briggs. He consequently can stand in no better position than theirs, in defending against the claim of Briggs; and the equity of redemption of Briggs in the premises can be asserted as well against him as against them.

The next question to be considered is, whether the defendant Gleason was properly made a party defendant in this case. So far as the orator's bill imputes to Gleason and to others of the defendants a conspiracy to effect the ruin of the orator, we have no difficulty in coming to the conclusion that it should be dismissed, as the testimony wholly fails to support this charge. We discover nothing in the conduct of Gleason as an officer which can justly be made the ground of complaint against him, either as being oppressive towards the orator, or as transcending the line of his official duty. But it is admitted by Gleason, both in his answer and in his testimony, that he received the proceeds arising from the sale of property belonging to Briggs which was attached in the suit in favor of the Life Insurance Company, subject to the lien of other attachments and levies previously made thereon. This admission would make him liable to account to Briggs for the proper application of these funds; and, by his answer and testimony, he sets forth a particular account in

detail of the proceeds of the attached property, and of the application which he made of those proceeds. We have made no particular examination of this account, nor considered the allegations which have been made in respect to it, because, if the duty or liability to render the account is established, this examination should, in the first instance, be made by a master, and it is no part of the duty of this court to assume duties and functions which appropriately belong to an officer of the court of chancery, or to anticipate questions which may properly arise when those duties are performed. The defendants Cooper, Russell, and Whipple stand in the position of equitable assignees of the debt of the Life Insurance Company against Briggs, and, as such, they have an interest in the results of the same account, and would be entitled in equity to claim from Gleason any funds remaining in his hands and belonging to Briggs which ought to be applied upon that debt. Whether there are any such funds or not can only be determined on a proper accounting by Gleason before a master. By the condition of the bond of Cooper, Russell, and Whipple to Briggs, it was provided that the sum which Briggs was to pay in compliance with its provisions was to include "what may remain of the debt or levy of the Life Insurance Company *which the personal property attached thereon shall be found insufficient to pay;*" and, to ascertain what this deficiency may be, it is necessary that an account should be taken of the attached property sold by Gleason, and of the application of those proceeds. Under this provision of the bond, an account by Gleason of the funds of Briggs in his hands, if there be any, which may be applicable to the debt in favor of the Life Insurance Company against Briggs is so essential that, without it, the amount equitably due from the orator on the security of the mortgage can never be ascertained. For these reasons, Gleason was, as we think, properly joined as a party defendant in this suit, and the orator is entitled to a decree directing the taking of this account. Even if there was a misjoinder of Gleason as a party, it was apparent on the bill itself, and the objection that he was improperly joined, if not made by demurrer to the bill or in the answer, should be considered as waived, and as coming too late when made at the hearing. *Chipman* v. *City of Hartford*, 21 Conn. 489, 499.

We do not consider the defendant Hodges a proper or necessary

party to the orator's bill. It appears that all the right and title of Joseph Reed to the land of the orator levied on and set off on the executions in favor of said Reed as before mentioned was conveyed by him to Hodges by a quit-claim deed on the 18th of April, 1853; and that all the right and title of the Life Insurance Company to the land of the orator levied on and set off on the execution in its favor as before mentioned was conveyed by the Life Insurance Company to Hodges by a quit-claim deed on the 23d of April, 1853; and that, on the 25th of April, 1853, Hodges conveyed to the defendants Cooper, Russell, and Whipple, by a quit-claim deed, his right and title in and to the land included in the levy of the execution in favor of Mr. Reed; and that on the same day, by a like quit-claim deed, he also conveyed to the defendants Russell and Whipple and Saul Bishop his right and title in and to the land included in the levy of the execution in favor of the Life Insurance Company, and that, on the 31st of March, 1856, Saul Bishop conveyed to the defendants, Cooper, Russell, and Whipple, by a quit-claim deed, his right and title in and to the farm in question, described as the farm formerly owned by Briggs, on which these levies were made. Each of these deeds was recorded immediately after it was executed.

This suit was commenced on the 27th of August, 1856, and at that time, Hodges neither had nor claimed to have any interest in the land included within either of these levies. The orator, in his bill, seeks for a discovery only from this defendant, but prays for no relief against him. When this suit was commenced, this defendant had not even a nominal interest in its subject matter, as he had long before that time parted with his interest in the premises, and, consequently, he was unnecessarily and improperly made a party to the orator's bill, and should be dismissed with costs.

All questions in respect to the form and details of the orders for the taking of the accounts and of all other necessary orders in the cause should be settled by the chancellor; and all questions in respect to the allowance of costs, except as to the defendant Hodges, should be reserved to be considered and determined on the final hearing in the cause.

The decree of the chancellor, by which the orator's bill was *pro forma* dismissed with costs, is reversed, and the cause is ordered to

be remitted to the court of chancery with directions that a decree be made therein declaring that the deed of Briggs to the defendants Cooper, Russell, and Whipple, dated the 8th of January, 1853, and their bond to him of the same date, mentioned and referred to in the complainant's bill, taken together, constituted a mortgage security as claimed in the bill, and that, by virtue of the same, Briggs was, and his legal representatives are, entitled to the equity of redemption in the premises conveyed by the deed which is claimed in the bill, and providing for the taking of such accounts as may be necessary to ascertain the amount due in equity to these defendants on account of the debts secured by this mortgage, including an account of the rents and profits of the mortgaged premises which came to the hands of these defendants, or of the defendant Whitcomb, or of any other person or persons by their order, or for their use, or which they without their wilful default might have received, after the defendants Cooper, Russell, and Whipple took possession of the mortgaged premises, and also including an account of the proceeds arising from the sales of the personal property of Briggs which was attached by the defendant Gleason on the writ in favor of the National Life Insurance Company against Briggs, and of the proper application of these proceeds, so far as may be necessary to ascertain whether the same or any part thereof are applicable to, or should be applied in, the payment of the debt or levy of the Life Insurance Company against Briggs, and also providing that when the amount due in equity to the defendants Cooper, Russell, and Whipple is ascertained and established, the cause shall be proceeded with to a final order and decree in favor of the complainant Wing, the executor of the last will and testament of Briggs against the defendants Cooper, Russell, and Whipple and the defendant Whitcomb, for the redemption of the mortgaged premises, according to the usual course and practice of the court of chancery,—the decree for the redemption of the mortgaged premises to be applicable as well to the premises called the "Worcester lands," referred to in the orator's bill and in the answers of the defendants Cooper, Russell, and Whipple as to the premises conveyed by Briggs to those defendants by the said deed dated the 8th of January, 1853,—and also providing that the bill be dismissed as to the defendant Hodges with costs, and that all questions in

respect to the farm and details of the orders for the taking of the accounts and of all other necessary orders in the cause shall be settled by the chancellor, and that all questions in respect to the allowance of costs, except as to the defendant Hodges, shall be reserved to be considered and determined on the final hearing in the cause.

CHARLES CLARK, *Administrator of* L. F. PIERCE, *v.* C. O. CROSBY.*

Contract. Jurisdiction. Good Faith. Supreme Court.

Upon consideration that the plaintiff, a dentist, would keep himself supplied with mineral teeth by purchases of the defendant, the latter agreed not to sell such teeth to any other person in the place where the plaintiff resided. *Held*, that the contract being only in partial restraint of trade, was not illegal.

Where the damages are open, or depend upon an estimate or appraisal, or the valuation of property, a motion to dismiss the suit for want of jurisdiction is addressed to, and rests in, the discretion of the county court, and the decision of that court upon that question cannot be reviewed in the supreme court.

ACTION ON THE CASE. Plea, the general issue. Trial by the court, September Term, 1863, PECK, J., presiding. The facts are fully set forth in the opinion of the court.

Judgment for the plaintiff. Exceptions by the defendant.

C. W. Willard, and *T. P. Redfield*, for the defendant, cited upon the point that the county court had no jurisdiction, *Hefflin* v. *Bell*, 30 Vt. 134; *Henry* v. *Tilson*, 17 Vt. 479; *Kittridge* v. *Rollins et al.*, 12 Vt. 541.

Wing & Lund, for the plaintiff, cited upon the question of jurisdiction, in addition to cases cited in the opinion of the court, *Ladd* v. *Hill*, 4 Vt. 164; *Stanley* v. *Barker*, 25 Vt. 507; *Willard* v. *Collamer*, 34 Vt. 594; and upon the point that the contract was not illegal on the ground of being in restraint of trade, Chitty on Con. 576–7–8; *Palmer* v. *Stebbins*, 3 Pick. 188; *Chappell* v. *Brockway*, 21 Wend.

* At the August Term, Supreme Court, 1864, the death of the plaintiff Pierce was suggested, and Charles Clark entered to prosecute as his administrator.

158; Addison on Con. 100; 1 Smith's Lead. Cas. marginal page (172) 430; *Blanchard* v. *Weeks*, 34 Vt. 589.

KELLOGG, J. The contract of the defendant upon which the plaintiff relies in this case is not subject to exception on the ground that it was illegal as being in restraint of trade. The restraint contemplated by it was only a partial and not a general restraint. A contract for a limited and partial restraint of trade has always been held valid, if reasonable, and made on a good consideration. Chitty on Contracts, 10 Amer. Edit. 736, *et seq.* The reasonableness of this contract, the fairness of its terms, and the sufficiency of the consideration for it, have not been questioned in argument.

The defendant claims that the suit should have been dismissed by the county court for the reason that it was not within the original jurisdiction of that court. It appears that the plaintiff purchased of the defendant's agent in September, 1856, and at different times thereafter, mineral teeth to the amount, in the whole, of $292.15, upon an agreement, made in consideration of the purchase, that the defendant should not sell such teeth to any person in Montpelier, where the plaintiff had his residence and place of business, so long as the plaintiff should keep himself supplied therewith by purchases of the defendant. The plaintiff fulfilled his part of the contract, but the defendant, in violation of it, sold on the 21st of April, 1859, to one Smith, a druggist at Montpelier, a quantity of such teeth, from which Smith subsequently and before the commencement of this suit, sold about twenty dollars' worth, the profits realized from which were less than ten dollars. The court found that the sales by Smith, and his offering the teeth in the same vicinity with the plaintiff at low prices, had the effect not only to lessen the amount of the plaintiff's sales, but so to reduce the price of the teeth in this market as to damage the plaintiff beyond the amount of profit which otherwise might have been made on the amount of Smith's sales; and the plaintiff claimed that it had the effect to render the stock of teeth which he had on hand unsaleable at any profit, and to render it almost valueless to him by ruining the reputation of the teeth in this market; and the court found that to some extent it had this effect. This finding conclusively establishes the fact that the plaintiff's dam-

ages for the breach of the defendant's agreement exceeded the amount of the profits on Smith's sales. It has long been settled that where the plaintiff, at the time of bringing his suit, expects to recover a sum exceeding the amount limited for the jurisdiction of a justice, but misjudges in that respect, so that his recovery is in fact for a sum less than that amount, the county court is not thereby ousted of jurisdiction. *Henry* v. *Tilson*, 17 Vt. 479; *Brainard* v. *Austin*, *ib.* 650; *Sanborn & Catlin* v. *Chittenden*, 27 Vt. 174. The county court, in refusing to dismiss the action, must have found that the plaintiff, when he commenced it, had a reasonable expectation of recovering more than one hundred dollars, and commenced it in that court in good faith. Where these conditions exist, the jurisdiction has always been sustained, even though it subsequently appears that the plaintiff has so greatly over-rated his damages that the amount of his recovery is less than the limit of the jurisdiction of a justice. Where the damages are open, or depend upon an estimate or appraisal, or the valuation of property, a motion to dismiss the suit for want of jurisdiction is addressed to, and, from the nature of the subject, must rest in, the discretion of the county court; and the decision of that court upon that question cannot be reviewed in this court. The case of *McGray* v. *Wheeler*, 18 Vt. 502, is a decisive authority on this point, and the application of this principle to this case effectually disposes of the defendant's exception in respect to the jurisdiction of the county court over this suit. Even if we were disposed to review the decision of that court on that point, the facts as found are not sufficient, as we think, to raise any question in respect to the good faith of the plaintiff in commencing his suit in that jurisdiction.

Judgment of the county court in favor of the plaintiff affirmed.

THE STATE OF VERMONT v. ROYAL S. CARR, AND AUSTIN J. LOOMIS.

Criminal Law. Confessions. Evidence.

The respondent, under the influence of inducements held out by the officer and an assistant, who made the arrest, made confessions to the latter. Five hours later, and on being told by the state's attorney that he must not expect any favor in consequence of a confession; that he was under no obligation to make one unless he chose to, he made a second confession. *Held*, that the second confession was admissible as evidence, and it will not be presumed to have been made under the influence of the previous inducements.

INDICTMENT for the murder of Mary E. Loomis at Worcester. Plea, the general issue.

The government proved that an inquest was held upon the body of the said Mary E. Loomis, and the justice of the peace before whom it was held, issued a precept for the arrest of the respondent Carr, and the same was delivered to O. L. Watson, the constable of Worcester, who took with him one A. C. Crain, and arrested Carr, and brought him with them to Worcester.

The government proposed to show by Watson and Crain that the respondent Carr made certain confessions after being arrested, and while riding with them and after arriving at Worcester. To this the respondent's counsel objected, claiming that said confessions were extorted by threats, and made under inducements of favor held out to him prior to and at the time when said confessions were made. And to sustain the objection the respondent's counsel assumed the examination of the witnesses Crain and Watson, whose testimony on this subject was addressed to the court, and was substantially that they told him that he would have a "steady home;" that there was no use in denying it, he had better own it up and tell the truth; that there were others connected with him, and he had better tell who—the public would have a better opinion of him. In a subsequent conversation Crain represented to him that he would befriend him. George Carr, a brother of the respondent, was present a part of the time and testified that Crain told the respondent, "You can turn state's evidence and get clear; that is the best thing you can do." This was about four or five o'clock in the afternoon.

The counsel for the respondent, before the confession was given in

evidence, gave evidence tending to prove, (and there was no proof offered by the government to contradict it,) that the respondent, Carr, was a person of feeble intellect; that he could neither read nor write; that he was mild and peaceable in disposition, and was *incapable of engaging* in business or the ordinary pursuits of life, but worked out some for wages, and in some instances made bargains relating to his labor. But it was not claimed in any stage of the trial, that the respondent was so low in mental capacity as to be incapable of committing the crime, nor did the proof in the opinion of the court go to that extent.

It appeared that after the interview between the respondent, Carr, and Crain, the state's attorney was sent for, and had an interview with Carr not far from nine o'clock in the same evening, and the government proposed to show that Carr made a further confession in the parlor of the tavern somewhere from nine to ten o'clock, in the presence of the state's attorney and others. This was objected to by the respondent's counsel, for the reason that the threats and inducements made and held out to the respondent were still operating upon his mind. The government proposed to show by the testimony of the constable, O. L. Watson, that the respondent had been cautioned. The court took the testimony of Watson, which was as follows:

"Not far from nine o'clock, on Wednesday night, it might have been ten o'clock, I was in the parlor, and Heath, (state's attorney,) told Carr if he wanted to make a confession he could do so, but he must not expect any favor. Cyrus Brown then told him (Carr) that he was not obliged to make a confession unless he chose to; that he was not obliged to tell anything to criminate himself. Deacon Abbott told him (Carr) that if he was going to tell anything to tell the truth—to tell it just as it was."

The respondent offered no further evidence to sustain his objection. Whereupon the court over-ruled the objection,—to which the respondent excepted.

The witness Watson then proceeded, under examination by counsel for the government, and related the confession of Carr, which was in substance, that he took part in the assault upon said Mary E. Loomis, and stated what he did, and what he saw Austin Loomis do.

There was evidence, among other things on the part of the state,

tending to show when and where and the circumstances under which the deceased was found dead.

It appeared on cross-examination of some of the government witnesses, without objection, that a short time before either of these confessions, the same afternoon, Carr was introduced by the state as a witness before a jury of inquest, in relation to the death, and testified that he knew nothing about the matter.

There was some other evidence against Carr, but of a circumstantial character.

Trial by jury, September Term, 1863, PECK, J., presiding. Verdict as to Loomis, not guilty; as to Carr, guilty of manslaughter.

H. W. Heaton, for the respondent.

I. It is well settled in this state, "that a confession must never be received in evidence when the respondent has been influenced by any threat or promise." *State* v. *Jenkins*, 2 Tyler, 377; *State* v. *Phelps*, 11 Vt. 116; *State* v. *Walker*, 34 Vt. 296.

II. It is evident that the threat and promise made to the respondent induced him to make the confession to Crain in the dining-room, and the confession made in the parlor, within a few hours after, is *presumed* to have come from the same motive or influence as the first, and if so it was improperly admitted in evidence. Wharton's American Cr. Law, book 11 § 694; 2 Russell on Crimes, 598; *Regina* v. *Hewett*, 41 E. C. L. 291; *State* v. *Roberts*, 1 Devereaux, 259; *Peter* v. *State*, Smedes & Marsh, 31; *Crun* v. *Harman*, 4 Burr. 269; *State* v. *Guild*, 5 Halst. 163.

III. It must be clear that the respondent fully understood the *warning* or what was said to him in the parlor; and he must have been informed that he was not bound by the confession previously made, before the confession then made can be used in evidence against him. Wharton's American C. L. § 694; *Van Broen* v. *State*, 24 Miss. 512.

And in determining this it is proper to have reference to the understanding and capacity of the respondent. *Mathews* v. *Clark*, 2 Aik. 209; *Brackett & Wife* v. *Wait et al.*, 6 Vt. 411.

IV. Confessions should be received with great caution. *U. S.* v. *Nott*, 1 McLean, 499.

C. H. Heath, state's attorney, for the prosecution.

I. The question of the admissibility of the confession is a question not properly before the court. *State* v. *Walker*, 34 Vt. 296.

II. The so called inducements held out to Carr were not such as to exclude his confession as he was only urged to tell the truth, and what he said he said voluntarily. Roscoe's Crim. Ev. 28; 1 Greenleaf Ev. § 215; 2 Russell on Crimes, 592. Nor were the supposed inducements offered by a person in authority.

III. The witness Crain had no authority over the respondent and no right to make any promises. *State* v. *Wentworth*, 37 N. H. 196; Wharton's Cr. Law, § 692 and cases there quoted.

IV. An inducement held out does not necessarily exclude a confession, but the true inquiry is, was there any such inducement held out, so operating on the mind of the respondent as to render it probable that the confession is untrue. 29 Penn. St. Rep. 429.

KELLOGG, J. The respondent, after verdict, filed a motion in arrest for the insufficiency of the indictment. No defect in the indictment has been suggested on the argument, and nothing appears in the exceptions which would warrant the conclusion that it was not applicable to the case made by the evidence on trial. As the grounds upon which the indictment is claimed to be defective have not been stated by the respondent's counsel, we find no reason to question its sufficiency; and it seems to be sufficient both in form and certainty of allegation, and to follow approved precedents. Wharton's Precedents of Indictments and Pleas, 145, 146, 148.

The principal inquiry in this case is whether the evidence of the confessions of the respondent was properly received. The value of any confession as evidence of guilt depends on its being voluntary, and the material inquiry is whether the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind. The law of the subject having been fully reviewed and considered in the recent case of *State* v. *Walker*, 34 Vt. 296, it is unnecessary to review at any length the principles settled by that case. The evidence detailed in the bill of exceptions in respect to the inducements under which the confession made by the prisoner to Watson, the constable, and Crain, his assistant, were elicited, was

undoubtedly sufficient to exclude that confession on the ground that it was prompted by the influence of a hope of some advantage or benefit to be derived from the making of it. But that confession was not given in evidence, and the confession which was introduced and received as evidence was made some five hours after the making of the confession to Watson and Crain, and after the prisoner had been told by the state's attorney that he must not expect any favor in consequence of making a confession, and after he had also been told that he was under no obligation to make any confession unless it was his choice and desire to make it. It is now claimed on behalf of the prisoner that it is to be presumed that the influence of the previous inducement continued, and that in order to make the second confession admissible as evidence, the respondent should have been informed that no use of his previous confession could be made against him. It is clear, as we think, that the language used by the state's attorney to the prisoner would remove from the mind of any person capable of understanding plain and simple speech any reliance which he might have placed upon an assurance of favor; and no question can be made in respect to the admissibility as evidence of the confession which followed on the ground that it was made under the influence of inducements then held out. If the previous inducements ever had any influence on the prisoner, we think that the evidence fairly warrants the conclusion that, at the time of making the confession which was given in evidence, he clearly understood that he had no right to expect any favor in consequence of making the confession. In regard to his alleged want of intelligence or intellect, it is to be presumed that the county court gave such instructions to the jury, in respect to the consideration and effect which should be given to the confession, as the evidence called for. No exception was taken to the charge on that ground. The admission of the confession as evidence was a question addressed to the discretion of the court, and the testimony stated in the bill of exceptions suggests no reason to doubt that this discretion was properly exercised in receiving the confession as evidence.

Exceptions overruled and respondent sentenced.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF ORLEANS,

AT THE

AUGUST TERM, 1864.

PRESENT:

HON. ASA O. ALDIS,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

S. S. OVITT *v.* NEWTON CHASE.*

School District. Taxes. Listers.

An article in the warning of a town meeting as follows: "To see if the town will make alterations in school districts when met," *held* sufficient to warrant the consideration by the town in town meeting of any proposed changes in the limits of existing school districts.

It seems, that all property subject to taxation should, for school district purposes, be assessed and set in the list of the district within which it had its *situs* at the time with reference to which the assessment should be made, and not elsewhere.

A vote of the town to set off the plaintiff's farm upon which he resides from one school district to another, no time of severance and annexation being specified, would take effect from its passage.

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* This case was submitted on papers and briefs at the August Term, 1863, and the opinion of the court was delivered at the present term.

But the property represented by the plaintiff's list, being a part of the basis of taxation in the former district, would be subject to all school district taxes legally voted or assessed upon it previously in that district.

Where the vote to set off said farm was passed May 12th, 1860, it should, in the list of that year, have been designated as belonging to the former district for taxation purposes.

But an error of the listers in setting it to the latter district would not be conclusive of the plaintiff's, or the district's right, if the town records furnished the necessary means of correcting it.

TRESPASS for taking certain cattle belonging to the plaintiff. Plea, the general issue and special pleas in bar, justifying the taking as collector of school district No. 1, in Jay. Trial by jury June Term, 1863, POLAND, Ch. J., presiding. The facts are fully set forth in the opinion. Verdict for the plaintiff under a *pro forma* direction of the court. Exceptions by the defendant.

T. P. Redfield and *H. C. Wilson*, for the defendant.

I. The vote to set off the plaintiff's farm from district No. 1 to district No. 2 and proceedings are insufficient in *form*, and the warning is too indefinite.

II. It is submitted that said farm, situate in district No. 1 on the first day of April, 1860, is, by law, subject to taxes in such *district*. It was the duty of the listers to have "designated" the farm in that district. The whole statute is consistent and clear in this, that real estate, as well as personal, is to be listed as it was on the first day of April. And if it be said this farm cannot be taxed in that district because not "designated" as in district No. 1, we answer "that is certain which can be made certain." It has its valuation inserted in the list and being "situate in district No. 1, the statute declares it shall be subject to taxation in that district. If the listers omit this mere clerical duty, which is a convenience to the districts, but leaves the *basis* of taxation in such district *just as certain*, it ought not to be held that schools are, for that reason, suspended. If the listers set a farm in the list in a district, where it is not situate, which the statute forbids, the act is void; and it does not become thereby the basis of taxation in *such district*. If they may do it, and there is no power to correct it, then they may, capriciously, set a farm successively in every school district in town and compel a taxation to build every school house in town.

We submit that no mere ministerial officer of the law can legally do an act which the law creating his office and defining his duty *expressly forbids.*

Benjamin H. Steele, for the plaintiff.

I. Was this act of the town in setting the plaintiff's farm out of the defendant's district valid, was it made by the proper authority? Was it made at the proper time, and when does the act take effect? No other authority could do the act, and there is no statute limiting the time when the town may act, or when the act shall take effect. They may, therefore, do the act at any properly warned meeting, and thereafter the list appertains to the district which owns the land. C. S. 144 § 16.

II. The setting off of the land to the new district amounts to the setting off of the list.

III. This was done before the listers had set to the several districts their lists, and they very properly designated the plaintiff's list where the town directed.

IV. The plaintiff was not bound to pay taxes in a district where he was not listed. The list as completed by the listers and records is the only basis of taxation. The plaintiff having no list in the defendant's district, the defendant had no basis for taxation. *Woodward* v. *French*, 31 Vt. 337; *Fairbanks & Co.* v. *Kittredge et al.*, 24 Vt. 9; *School District No.* 1. v. *Kittridge*, 27 Vt. 650.

V. If the listers erred the remedy is against them.

KELLOGG, J. In the month of March, 1860, the plaintiff changed his residence to a farm which he had purchased, and which was then situated in the first school district in the town of Jay, and continued to reside on this farm during the remainder of that year. At a town meeting held in that town on the 12th of May in the same year, it was voted that this farm should be taken from that school district and be annexed and set to school district No. 2 in that town. In the grand list of the town for the year 1860, (which was not completed until after the time when this town meeting was held,) the plaintiff's list was designated by the listers as belonging for the purpose of taxation to school district No. 2. This is an action of trespass for taking and driving away certain cattle belonging to the plaintiff. The defendant, who was collector of taxes of school dis-

trict No. 1, justified by his pleas the alleged taking of the cattle under a rate bill and warrant for the collection of taxes duly assessed by a vote of school district No. 1 on its grand list for the year 1860,—the plaintiff's list for that year being included in the rate bill for the taxes as belonging in that district. The plaintiff by his replication denied that he had any list for that year belonging to school district No. 1, on which the taxes in question could be legally assessed. It is admitted by the parties that the plaintiff's list on the 1st of April, 1860, consisted of his poll and farm only; and that both of the taxes on this list, under which the defendant, as collector of taxes of school district No. 1, justified the taking of the plaintiff's property which is the trespass complained of, were duly voted by that school district before the farm of the plaintiff was annexed by the vote of the town to school district No. 2,—one of these taxes being voted on tho 27th of March, 1860, and the other on the 4th of April, 1860, but that neither of said taxes was actually made up or assessed by the prudential committee until the 26th of March, 1861. The questions which arise on these facts are, (1,) whether the vote of the town annexing the farm on which the plaintiff resided to school district No. 2 was legal;—(2,) if the farm on which the plaintiff resided was, by the vote of the town, legally annexed and set to school district No. 2, when did the act of annexation take effect, and what effect did it have, if any, upon the plaintiff's list; and, (3,) whether the act of the listers in designating the plaintiff's list as belonging to school district No. 2 was conclusive as to the right of the plaintiff, or of school district No. 1, so as to preclude further inquiry in respect to that point.

I. The statute (C. S., p. 144, § 16; G. S., p. 151, § 20) confers upon each town, acting "at a legal meeting notified for that purpose," full power in respect to the division of its territory into school districts, and the alteration of the limits of existing districts from time to time, as may be found expedient. The power of the town of Jay, by a vote at a meeting legally warned and held for that purpose, to set the farm on which the plaintiff resided from school district No. 1 to school district No. 2 is not questioned; but it is claimed by the defendant that the vote of the town at the town meeting held on the 12th of May, 1860, setting off this farm from school district No. 1

to school district No. 2 was illegal, because it was not within the scope of the terms of the warning for that meeting. The statute requires that "the business to be done and the subjects to be considered" at a town meeting shall be "set forth" in the notification or warning for the same, and that all such notifications or warnings shall be recorded at length on the town records. (C. S., p. 113, §§ 3, 6; G. S., p. 106, §§ 3, 6.) The second article in the warning for this town meeting was as follows: "*To see if the town will make alterations in school districts when met.*" The subject of altering the limits of the existing school districts was submitted by this article for the consideration and action of the town, and the article could not have been understood otherwise than as a proposition to make such changes in the limits of the existing school districts as should, on consultation and comparison of views in town meeting, be found expedient. Every voter in the town meeting should be presumed to have had full knowledge of the general power of the town over the subject matter, and no person interested could have been misled in respect to the nature or the extent of the proposition. Nothing more is required by the sense and reason of the statute than that the subject for consideration should be indicated in the warning with reasonable certainty, and in such a manner that no person interested could be misled in respect to the proposition submitted for the consideration and action of the town. *Moore* v. *Beattie*, 33 Vt. 219. We regard this article in the warning as being sufficiently definite to warrant the consideration by the town in town meeting of any proposed change in the limits of the existing school districts in the town, and to support the vote setting the farm on which the plaintiff resided from school district No. 1 to school district No. 2.

II. By statute, all property subject to taxation is to be assessed in the list with reference to its situation and value on the first day of April in each year; (Acts of 1855, No. 43; G. S., chap. 83,) and all school district taxes voted on the first day of March, or at any time thereafter within one year are to be assessed on the list to be completed on the 15th day of May following, (Acts of 1854, No. 66, G. S. p. 538, § 67,) and all real estate is to be taxed in the school district in which it is situated. (C. S., p. 149, § 39; G. S., p. 156, § 45.) There are other statute provisions declaring that all personal

property liable to taxation, and assessed in any town other than where the owner resides, shall be liable to pay taxes in the school district where such property was kept on the first day of April in the year in which the assessment was made, (Acts of 1855, No. 43, § 25; G. S., p. 520, § 26,) and requiring that school district taxes shall be assessed "on the list of the inhabitants of such district, and on lands in such district belonging to persons living out of it." (C. S., p. 149, § 41; G. S., p. 156, § 47.) These provisions would seem clearly to indicate the intention of the legislature that all property subject to taxation should, for school district purposes, be assessed and set in the list of the district within which it had its *situs* at the time with reference to which the assessment should be made, and not elsewhere. The vote of the town setting off the farm on which the plaintiff resided from school district No. 1 to school district No. 2 did not prescribe or specify any particular time when the act of severance and annexation should take effect, and it should consequently be considered as having an immediate and present effect. As the property represented by the plaintiff's list was, beyond controversy, a part of the basis of taxation in district No. 1 up to the time when this vote took effect, it would be subject to all school district taxes legally voted or assessed upon it in that district previous to that time. The property should, in the list of 1860, have been designated as being situated or liable to taxation in district No. 1,—its *situs* and the plaintiff's residence being in that district on the first day of April in that year. The vote of the town could not affect any right of district No. 1 in respect to a tax on this list which had before that time been legally voted or assessed. The vote made a present and prospective, and not a retroactive, transfer of the plaintiff's domicile and the *situs* of his farm and property from the one district to the other; and his list cannot be treated as forming a part of the basis of taxation in both districts at the same time. The act of severance and annexation was not only virtually but necessarily equivalent to the transfer of the plaintiff's list and liability to future taxation thereon to the district to which the *situs* of his domicile and property was annexed. This construction is in harmony with the reason and sense of the statute, and is just, as well to the tax payer as to the districts affected

by the transfer. Without this construction, the vote of severance and annexation could not have any present effect; and, if a district should be divided and the whole of its territory set to adjoining districts, the property in it might, for a considerable period of time, escape from taxation for the support of schools in any district. We cannot believe that such a result was intended by the legislature. When the taxes on the plaintiff's list, under which the trespass complained of is justified, were voted, that list belonged to school district No. 1, and was a part of the basis of taxation in that district, and the plaintiff's liability for the taxes became fixed and certain by the votes under which they were respectively raised; and the subsequent annexation of his farm and transfer of his list to school district No. 2 could not affect that liability.

III. The plaintiff's list on the 1st of April, 1860, should, for the reasons already mentioned, have been designated by the listers as belonging to school district No. 1 in the list for that year. A record of the boundaries of school districts is required by law to be made in the town clerk's office whenever those boundaries are established or changed; and this record would, or should, on inspection, furnish the means of determining the school district to which any particular farm or parcel of real estate within the town belonged. But, in respect to personal estate, there would be nothing on the records of the town from which its *situs* could be ascertained except the designation of it to the several school districts as made by the listers in making up the list; and those records would consequently furnish no means of correcting such a designation, even though it might in fact be erroneous or improper. This consideration would seem to be the only ground upon which the designation of personal estate to the list of a particular school district could be held to be so conclusive as to make it a part of the list of the district for purposes of taxation as suggested in the case of *Woodward* v. *French*, 337, 343; but this ground has no application to the case of an error in designating real estate to the list of any particular district, because the *situs* of real estate is supposed to be always capable of being ascertained from the town records. This is not a case in which any division or apportionment

of the plaintiff's list became necessary in consequence of the transfer of his domicile and farm from one district to the other; and no embarrassment arises from the consideration that the statute has made no distinct provision for such a case, because the transfer included the domicile and farm of the plaintiff in its entirety. It has been held that the basis of taxation in a school district does not depend upon the continued residence of the tax payer within the district, if he was subject to taxation in the district when the list was made; (*Woodward* v. *French*, *ubi supra*; *Walker* v. *Miner*, 32 Vt. 769;) and it would seem necessary to make the basis of taxation effective that it should not be held to depend upon a circumstance so accidental as the neglect of the listers to perform a merely clerical duty. We think, therefore, that the act of the listers by which the plaintiff's list was erroneously designated as belonging to school district No. 2 was not conclusive either upon the plaintiff or upon school district No. 1 in respect to that point; and that the prudential committee of school district No. 1 was justified by the statute provision requiring all real estate to be taxed in the school district in which it is situated in treating that list as belonging to his school district up to the time when the vote annexing the plaintiff's farm to school district No. 2 took effect. In other words, we regard the error of the listers in making an erroneous designation of this list as not being beyond the possibility of correction if the town records furnished the necessary means of correcting it.

The judgment of the county court, which was *pro forma* in favor of the plaintiff, being inconsistent with the grounds of decision and conclusions now adopted, is reversed; and the case will be remitted to that court for a new trial.

ALBERT N. STEVENS *v.* REUBEN KIRK, AND L. ROBINSON AND S. M. FIELD, *Trustees.*

Trustee Process. Fraud.

It is not in all cases necessary for the report of a commissioner in trustee process to show in terms that the sale was fraudulent; such facts may be found as to enable the court to say as matter of law that the sale was fraudulent and void.

Where a grantee executes a bond giving the grantor the right to redeem the land purchased, and subsequently makes an exchange of this for other land with the consent of the grantor and the understanding that the right of redemption is still to continue in the land received in exchange the same as before, it is *held*, that if the grantee is trusteed by a creditor of the grantor, the land received in exchange will stand in the same condition so far as the trustee process is concerned as the land deeded in exchange stood while the trustee held it.

The grantee would not be liable as trustee of his grantor for a note not collected which he received in the exchange of lands as the difference in value.

The facts found by the commissioner are not sufficient to authorize the court to pronounce the sale by the defendant to the trustees fraudulent and void as to the creditors of the defendant.

TRUSTEE PROCESS. The commissioner appointed to take the disclosures and proofs in this case reported that it was proved that the plaintiff then residing at St. Albans, on the 1st day of November, 1858, sold to the defendant's son and one Graves, then doing business as merchants at South Troy under the style of Kirk & Graves, a quantity of goods, and received in payment the notes of Kirk & Graves to the amount of $2500., signed by Reuben Kirk as surety of that date.

Kirk & Graves failed in business in the summer of 1859, and the goods on hand, including what remained unsold of those purchased of the plaintiff, were by them assigned to Reuben Kirk and Madison Stebbins, to secure them for having endorsed and become surety for Kirk & Graves.

The plaintiff obtained an injunction against the defendant and Stebbins' making any sale or disposal of these goods, which injunction was dissolved in the fall of 1859, mainly on the ground of the solvency of Reuben Kirk, the valuation of whose property at that time the commissioner found to be from four to six thousand dollars, which consisted mainly of his farm and stock; and his indebtedness was trifling, except that to the plaintiff.

It was proved that the trustees Robinson & Field were aware of the defendant's liability to the plaintiff upon these notes as early as the summer or spring of 1859, and the defendant counselled them to some extent about the propriety of selling his property at auction, and Robinson wrote the advertisement, caused it to be printed, and aided the defendant in the distribution of the same.

The commissioner found that the condition of the defendant and family was such that a disposition of his farm and stock and the purchase of a small place, if well done, was wise economy, and that such was his avowed motive. On the 19th of May, 1860, Reuben Kirk and wife conveyed by deed to Robinson & Field for $2000. all of the defendant's real estate; and all his attachable personal property or nearly so was sold at auction in the spring of 1860. The grantees also executed a bond giving Kirk a right to redeem said real estate, dated the 24th day of May, but made in fulfilment of an understanding at the time of the sale.

It was proved that $2000. was bid and offered for a portion of the land conveyed to Robinson & Field, and it was apparent that the defendant was desirous that the title of his farm should pass to them, but the expectation of redemption of the premises could not have been the reason, for the defendant testified that the conveyance was absolute, but the negotiation and bargain was made mostly with the defendant's wife and daughter.

The land was conveyed to said trustees for less than the actual value. Field had a mortgage on said premises, and Robinson paid to him a sum sufficient to reduce the mortgage to one thousand dollars. The trustees sold and conveyed the land in Troy (a portion of the land conveyed to them) to William Blake for a conveyance to them of Blake's tavern stand in Derby and Blake's note of $500., which was done with the consent of the defendant.

From the proofs and circumstances the commissioner reported that he was satisfied that the approaching maturity of the plaintiff's notes and the liability of the defendant's property to attachment at the suit of the plaintiff, was a leading motive with the defendant in disposing of his property in the manner he did, and that he had a purpose to place his property in a condition less accessible to his creditors,

and that as between them and the defendant the conveyance was *fraudulent.*

There was no evidence that either Robinson or Field had any connection with Kirk or his family about disposing of the defendant's property for any such illegal purpose. But said trustees knew that one of the plaintiff's notes would mature in November, and that the defendant was disturbed about his financial affairs, and were willing to improve that condition of the defendant to drive a sharp bargain and make money.

The statements in the disclosures were not contradicted by evidence, except as to the character of the transaction, whether fraudulent or not.

As the defendant's indebtedness to the trustees was larger than the money or avails of any property received, aside from the land, the commissioner adjudged that the trustees would not be liable even though the plaintiff's claim be conceded that the conveyance was fraudulent as to the defendant's creditors.

The commissioner therefore adjudged that the trustees Robinson & Field were not liable in this action.

Upon this report the county court, December Term, 1862, rendered judgment in accordance with the report of the commissioner. Exceptions by the plaintiff.

B. H. Steele, for the plaintiff, cited *Root* v. *Reynolds*, 32 Vt. 139.

C. Robinson and *J. L. Edwards*, for the trustees, cited *How* v. *Field*, 5 Mass. 390; *Baxter* v. *Currier*, 13 Vt. 615; *Hunter* v. *Cuse*, 20 Vt. 195.

PECK, J. The question in this case is whether the trustees are chargeable.

On an accounting on the basis of the prices agreed upon between the trustees and the principal debtor at the time the trustees received the assets real and personal, the commissioner's report does not show any balance in the hands of the trustees subject to the trustee process. This is the result after deducting the claim of $318, made by the trustee Robinson for money paid to Mrs. Keith which the commissioner disallows. It is true that exclusive of interest there would be a trifling sum due from the trustee Robinson, but the balance of interest in favor of the trustee to which he probably would be enti-

tled, would turn the balance the other way; but whether it would or not the sum being less than $10. could not be held by trustee process. Whether the conveyance of the real estate is regarded as *bona fide* or as fraudulent as to creditors, does not vary this result, if the creditor goes for the stipulated price of the land, since in either case if the plaintiff seeks to recover the price by trustee process, he thereby adopts the sale to the trustees and must take it according to its terms, and be content with the price agreed upon by the parties to the conveyance. Beyond the price agreed no indebtedness was created. The whole $2000., the price agreed upon for the real estate, having been accounted for to the principal debtor, the trustees cannot be chargeable for the real estate unless something has transpired since the sale to the trustees to change the relation of the parties even if the conveyance should be held to be fraudulent as to creditors.

It is well settled that a purchaser of real estate under a conveyance fraudulent and void as to creditors, cannot be held as trustee on account of the land held by him under such conveyance, unless he is indebted to the principal debtor for the price stipulated.

But the plaintiff claims that the conveyance to the trustee was fraudulent and void as to creditors, and that as the trustees have conveyed the premises, the plaintiff can hold the trustees for the value of the land or the avails of such sale.

There are some facts reported by the commissioner tending to show the conveyance fraudulent and void as to creditors, but no fact is reported which is conclusive, nor does the commissioner find the fact that it was fraudulent. But it is claimed that the facts found are sufficient for the court to pronounce it fraudulent. It is true as claimed in argument, that it is not in all cases necessary for the report to show in terms that the sale was fraudulent, such facts may be found as to enable the court to say as matter of law that the sale was fraudulent and void. It was proper for the commissioner after stating the facts and circumstances appearing in his report, to draw a conclusion of fact which he has done in this case, as the facts previously stated by him do not necessarily make the conveyance void. The ultimate finding of the commissioner is that a leading motive and purpose of the principal debtor in disposing of his property as he

did, was to place his property in a condition less accessible to his creditors, and that as to the principal debtor the conveyance was fraudulent, but that there was no evidence that either of the trustees had any connection with him or his family about disposing of the defendant's property for any such illegal purpose, but that the trustees knew that the plaintiff's notes would mature in November after, (one of them,) and that the defendant was disturbed about his financial affairs, and were willing to improve that condition of the defendant to drive a sharp bargain, and make money. This knowledge and conduct on the part of the trustees, in connection with other facts previously stated in the report, point in the direction of knowledge on the part of the trustees of the fraudulent design of the grantor, but it is not conclusive. The report would have been more explicit and satisfactory had the commissioner found in terms whether the trustees knew of the fraudulent design of the principal debtor, but he has not done so. He has however reported that "there was no evidence that either Robinson or Field (trustees) had any connection with Kirk or his family about disposing of the defendant's property for any such illegal purpose." This probably was intended to exclude the idea that the trustees had knowledge of, or were privy to the fraudulent purpose and design of Kirk, and we think we must so regard it. Taking the whole report together therefore, it is not inconsistent with good faith on the part of the trustees towards creditors. We have no occasion therefore to decide whether a fraudulent grantee of real estate who has sold the property, can be held as trustee for the avails in his hands. But if such grantee can be thus held, and we should hold this conveyance to the trustees fraudulent, there might still be a difficulty in holding the trustees chargeable in this case. It appears that the trustees when they took the conveyance from Kirk, executed a bond giving him a right to redeem. The bond is dated a few days after the date of the deed, but the report shows that the bond was executed in pursuance of an agreement made cotemporaneous with the execution of the deed to the trustees. Taking the deed and bond together, the conveyance has the character of a mortgage with a power of sale. When the trustees exchanged the premises for the tavern stand in Derby, and took a note for $500. for the difference, it was done with the consent of Kirk and

with the understanding that Kirk's right of redemption was still to continue in the tavern stand the same as before. This appears from the disclosures which the report states were not controverted except as to the question of fraud. It is difficult to see why the tavern stand is not in the same condition so far as the trustee process is concerned as the land deeded in exchange while the trustees held it. As to the $500. note taken in the exchange as the difference in the value, it not being collected it cannot be held by trustee process against these trustees, even if it could be treated as the property of the defendant Kirk. In any view of the case we are unable to see how the trustees can be held chargeable.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF ESSEX,

AT THE

AUGUST TERM 1864

PRESENT:

HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

TOWN OF LEMINGTON *v.* ANDREW BLODGETT.

Record. Evidence. Town Officers. Intoxicating Liquor.

A record of the warning of a town meeting and of the proceedings of the meeting held agreeably thereto, is sufficient *prima facie* to show that the warning was in fact posted up as required by law.

The law does not require selectmen to be sworn.

Parol evidence is admissible in behalf of the town to show that the selectmen elected, acted as such during the year.

The official certificate of the town clerk is *prima facie* authentic, and papers certified by him are admissible in evidence without other proof that he was either elected to the office, or sworn.

The fact that the selectmen became personally liable for liquors purchased by them in behalf of the town for their town agency, and which were turned over to the agent, does not rebut the presumption that the liquors became the property of the town.

The plaintiffs' declaration contained counts in trespass and trover for the taking and conversion of a quantity of brandy and rum. Plea, the general issue with notice that the defendant, as deputy sheriff, attached said liquors as the property of Augustus Osgood, on a writ in favor of Lyman Lumbard and sold the same on an execution. On the trial, at the September Term, 1863, POLAND, Ch. J., presiding, the plaintiffs offered in evidence the record of the warning and proceedings of the annual March meeting in Lemington in 1862. The defendant objected to the same because it did not appear that said warning was legally posted according to the statute. The record was admitted in evidence,—to which the defendant excepted. It appeared by the record that Thomas Holbrook, Jr., John Cook, and Augustus Osgood, were elected selectmen for the ensuing year. The plaintiffs then offered parol evidence that said Holbrook, Cook and Osgood acted as selectmen for that year. This was objected to by the defendant but admitted,—to which the defendant excepted.

The plaintiffs' evidence tended to prove that for the year previous to the 7th of May, 1862, the defendant had been agent for the town of Lemington for the sale of spirituous liquors, under a contract with the selectmen. At the expiration of his agency the defendant had on hand some liquors which he had purchased during his agency for the previous year, with his own money, which said selectmen wished to procure to supply the agency for the ensuing year, and they accordingly perfected an arrangement with the defendant, and gave him a written obligation in the following words:

"Received of Andrew Blodgett, former agent, one barrel of rum at sixteen dollars and eighty-four cents, and eight gallons of brandy for thirty-six dollars, making in all the sum of fifty-two dollars and eighty-four cents, which we jointly and severally promise to pay him in one year from date and interest, he having paid for said liquors out of his own money, by agreement with the selectmen last year.

THOMAS HOLBROOK, JR., } *Selectmen of*
AUGUSTUS OSGOOD, } *Lemington.*

May 7th, 1862."

On the 8th of May, 1862, the selectman Osgood, the defendant, was appointed agent under an arrangement that he should receive as

compensation what the other selectmen should say his services were worth at the end of the year.

Osgood proceeded to sell as agent from the liquors procured of the defendant, and purchased some more with money received by him from the sales of liquors, but at one time not having money sufficient to purchase what he wished, he applied to Holbrook, the selectman, who advanced him ten dollars out of his own money, which Osgood repaid out of the avails of the sales of liquors.

Holbrook testified that Osgood applied to him as selectman, and that he advanced his own money because the town then had no funds.

After said liquors had been attached by the defendant, Osgood gave up his agency and the selectmen settled with him. He accounted for the profits of all sales and the selectmen allowed him five dollars for his services. Other facts are stated in the course of the opinion.

The plaintiffs conceded that the liquors were taken by the defendant and disposed of by him under precept against Osgood in the manner set up in his notice under his plea.

The court held and instructed the jury that if all the evidence was believed the plaintiffs were entitled to a verdict for the liquors taken by the defendant at their value when taken and interest thereon since. The jury returned a verdict for the plaintiffs. The defendant excepted to the directions given to the jury and to the refusal to direct a verdict for the defendant as requested. There was no evidence that the selectmen or other town officers of that year had ever taken the oath of office. The defendant's counsel claimed that none of their official acts were valid so far as the town was concerned unless that was shown, but the court overruled the objection,—to which the defendant excepted. It also appeared on the trial that said Osgood gave no bond to the town as agent, and that none was required by the selectmen. It also appeared that after the liquors were attached by the defendant and after this suit was brought the town paid to the defendant the amount specified in the writing given to him by the selectmen.

——— *Barker*, for the defendant.

Ira A. Ramsey and *Wm. Heywood*, for the plaintiff.

Barrett, J. The record of the warning, dated the 18th of February, for a meeting the 4th of March, and that the inhabitants met

agreeably to the above notification, and thereupon chose all their town officers, and voted all their taxes, is sufficient, *prima facie*, to show that the warning was, in fact, posted up in conformity to the provisions of the law.

The law does not require selectmen to be sworn. Even if it did, it would be presumed that they were so sworn, unless the contrary is shown, in cases where they undertake to protect themselves from personal liability by reason of their office.

It was proper, in behalf of the town, if there was need of it, to show, by parol, that the selectmen, who had been elected, acted as such during the year.

The official certificate of the town clerk is *prima facie* authentic, and it is not necessary, in this state, in order to render a record, or other paper certified by him, admissible in evidence, to show by other proof that he was either elected to the office, or sworn.

The only remaining questions arise as to the direction of the court to the jury, that if all the evidence was believed, the plaintiff was entitled to recover.

Osgood was appointed agent by the commissioner on the 8th of May, 1862, the year and office of the defendant as such agent having expired. Prior to this, and for the purpose of supplying the agent, who should succeed the defendant, two of the selectmen negotiated with the defendant, in respect to the liquor he then, as such agent, had on hand, and on the 7th of May the negotiation resulted in an agreement that he was to, and he did, deliver the liquor, for the purpose aforesaid, to said selectmen, one of whom was Osgood. On Osgood's being appointed agent, he took the liquors thus procured, and held and sold from them as such agent, up to the time it was attached by the defendant as constable, on a writ against Osgood. The question is, whether the liquor thus in the hands of Osgood, was the property of the town. In considering the evidence, it is proper to premise that the statute creating the agency and authorizing the sale of liquor by him, contemplates that the liquor shall belong to the town, and only to the town; and, by the force of its provisions, as well as by its whole policy, it excludes the idea of the agent himself being such owner.

The evidence shows clearly that, in what the selectmen did, they were, in their own intention and belief, acting in behalf of the town. The paper they gave to the defendant, though by its terms it was a personal promise by themselves, still it is apparent from its recitals and the manner in which it is signed, that it was made by them in behalf of the town.

If they were thus acting for the town, the fact that they gave to the defendant their personal obligation to pay for the liquor would not affect the question of the ownership of the liquor. It was an undertaking in the character of sureties for the town,—they taking the hazard of being relieved from the burden of the liability thus assumed. It appears, though the fact may not be very material, that the town did pay for the liquor in discharge of the undertaking of the two selectmen.

The fact that the liquor went into the possession of Osgood has no tendency to show, or to constitute, him the owner of the liquor,—because, as before said, Osgood was the liquor agent of the town, and, under the law, the liquor held by him as such agent is to be regarded as the property of the town till it be made affirmatively to appear that it belongs to somebody else.

The various points made as to the effect of the manner in which Osgood's compensation was to be, and was fixed, and as to money furnished by Holbrook, one of the selectmen, to purchase more liquor for the agent to sell, and as to the mode in which the liquor in question had been procured by the defendant as the former agent, cannot be regarded as operating, in law, to countervail or invalidate the title of the town, as depending on the transaction shown by the evidence, by which the liquor came into the hands of Osgood as agent.

What the defendant testified, whether true as he claimed, or false, as Holbrook testified it was, viz: that the defendant refused to sell it to the selectmen on the credit of the town, so as to have the town made chargeable for it, and insisted that they should do as had been done the previous year,—*i. e.*, have an agent that would procure the liquors with his own money,—we regard as entirely immaterial; for the effect of the transaction must stand upon what was really consummated by it, as affecting the title to the liquor. The defend-

ant was not acting in behalf of, or in privity with, the town; and when he had parted with the liquor, his notions or will could have no effect upon the title as between the selectmen and the town. On the whole then we see no error in the direction given by the county court.

Judgment affirmed.

TOWN OF LEMINGTON *v.* ANDREW BLODGETT.

Pleadings. Towns. Intoxicating Liquor.

Assumpsit in the general counts is the appropriate form of action for a town, as well as an individual, to recover for money which the defendant improperly withholds.

Money received by the town liquor agent for the liquors legally sold by him as such agent, is presumed to be the money of the town.

The fact that the agent, by agreement with the selectmen, advanced the money for the purchase of the liquors at a specified rate of interest, would not rebut that presumption.

ASSUMPSIT in the general counts. Plea, the general issue. Trial by jury, September Term, 1863, POLAND, Ch. J., presiding.

The plaintiffs' evidence tended to prove that the defendant was duly appointed agent of the town of Lemington for the sale of spirituous liquors, from the first Monday in May, 1861, to the first Monday in May, 1862. The selectmen of the town made a contract with him by which he was to advance all money necessary for the purchase of liquors, and was to be paid 12 per cent. interest thereon from the time of the purchase of each bill of liquors till the whole of each bill should be sold, and he was to account to the town for the profits on the sales of liquors, and to receive twenty-five dollars for his services. The selectmen examined the defendant's account in May, 1862, and claimed that there was a greater sum in the defendant's hands for which he should account than appeared upon his accounts, but the defendant denied this and refused to account for more. The defendant soon after paid into the town treasury the sum of $21.83, which was the amount his accounts showed was due.

The defendant's counsel claimed that this form of action was inappropriate and improper to enable the plaintiffs to recover for the claim set up, even if made out by the proof. But the court overruled the objection,—to which the defendant excepted.

The case was submitted to the jury under a charge not objected to, except as to the form of action, and the jury gave a verdict for the plaintiffs.

W. S. Ladd, for the defendant.

1. The plaintiffs cannot recover, because assumpsit is not the proper remedy against a public officer acting ministerially, for malfeasance in office.

2. They cannot recover by virtue of the statute, (1,) because there was in fact (as the case shows) no legal obligation to support an implied promise; (2,) because the declaration is defective in not alleging a consideration upon which to found an implied promise. *Streeter* v. *Sumner*, 19 N. H. 518; *Sanborn* v. *Emerson*, 12 N. H. 62; *Colburn* v. *Pomeroy*, 44 N. H. 19, and cases there cited; *Bath* v. *Freeport*, 5 Mass. 325; *Wrentham* v. *Attleborough*, *ib.* 430; *Londonderry* v. *Windham*, 2 Vt. 149.

3. They cannot recover on the contract reported in the case; (1,) because the town as a corporation created by statute had no legal power to make such a contract, and hence could not be made a party to it by any act of the selectmen; (2,) because the contract was *illegal*.

Ira A. Ramsey, for the plaintiffs, cited *Thompson* v. *Babcock*, Brayt.; 2 Chitty on Contracts, 535; also, 536 note; *Phelps, Dodge & Co.* v. *C. B. Conant & Co.*, 30 Vt. 277.

Barrett, J. This is assumpsit in the general counts. The claim of the town was for money, to which it was entitled, in the hands of the defendant, as agent under the statute to prevent the traffic in intoxicating liquors. The fact of such agency was shown, and that the defendant for the year prior to May, 1862, had acted as such agent in the sale of liquors for the purposes prescribed and allowed by the statute. No question seems to have been made in the county court but that the evidence tended to show that the plaintiffs had a lawful claim against the defendant for such money; but it was objected that "this form of action was inappropriate and improper to

enable the plaintiff to recover for the claim set up, even if made out by the proof." This objection raises the only question presented by the bill of exceptions; for the bill states that "the case was submitted to the jury under a charge not objected to, except as to the form of action, and the jury gave a verdict for the plaintiff."

The main reason urged in support of this objection, is that the declaration should, in a case like the present, set forth specially the facts, out of which the defendant's liability arises; and several cases are cited, in which, in suits *against* towns, to recover upon liabilities to which they are subjected by special provisions of statute, it has been held that such special mode of declaring is necessary.

The reason for the rule in such cases is quite obvious, and is peculiar to the character of the defendant in those cases, and to the relation that the parties sustain to each other under the statute, in respect to the subject matter of the claim in suit. But that reason does not exist in the present case. A town, as well as an individual, may own property and money, and may have the same right in respect thereto; and, as between the town and an individual who has had to do with the property or the money of the town, we know of no rule or case requiring any different form of action in behalf of the town against such individual for a trespass upon, or injury to, or a conversion of the property, or for the improper withholding of the money of the town, from what would be proper between two individuals.

It is very familiar law that the action for money had and received is an appropriate form to recover for money belonging to the plaintiff, which the defendant holds without right, and against equity and good conscience.

It remains then only to be considered whether the evidence tended to show whether the defendant thus held money belonging to the plaintiff.

In the first place it is to be remarked, that the statute obviously contemplates that the money received by the agent, for liquors sold by him as such agent, and in the exercise of the office with which he is invested under the law, is the money of the town. The provision is explicit, and peremptory, and exclusive, that it shall be paid

over to the treasury of the town. The primary presumption would be, therefore, from the fact of receiving money for liquors sold by the agent, that it belonged to the town; and in order to rebut and overcome such presumption, it would require a showing of a state of facts which would invest the agent with the title and property in the liquor, in his own personal right, and not by virtue of his office as such agent. We think even if the evidence tended to show such a state of facts, it, at the same time, tended to show that, in point of fact, as between him and the town, the liquor in his hands as such agent, under the arrangement with him by the selectmen, for the procuring thereof, was the property of the town, and therefore held by him in conformity with the provisions of the law.

The arrangement for him to advance the money for the purchase of the liquors necessary for his agency, at an interest of twelve per cent., was consistent with, and might constitute a mere loan of the money to the town, depending on the facts and circumstances from which the intent of the parties was to be deduced. If it was, as between the parties, such a loan, then of course the title to the property purchased with it would not accrue to the defendant, any more than if the money had been derived by the town from any other source, or the liquor had been purchased on the credit of the town.

As the case was submitted to the jury under a charge that was satisfactory, it is to be taken that all questions arising upon the evidence were submitted under that charge, and the verdict thereupon rendered would be conclusive as to all such questions.

This being so, nothing seems to stand in the way of a recovery by the town in this form of action.

Judgment affirmed.

DAVID S. AUSTIN *v.* CHARLES BAILEY AND E. F. BAILEY.

Ejectment. Administrator's Lien. Adverse Possession.

The grantee of an heir holds the land, as the heir did, subject to the administrator's lien; but, even in a case where it is shown that administration was granted upon the estate, it will be presumed, after the lapse of nine years without any interference of the administrator, that his lien has been satisfied, especially when the party denying the right of the heir's grantee is a stranger to the title.

The plaintiff was in possession of the land in controversy claiming to have bid it off at a tax sale. W. subsequently entered into possession, claiming to have paid the tax and to have a receipt therefor. They then agreed that W. should remain in possession the rest of the season, and if he did not produce said receipt he should quit, which he did in the fall without producing the receipt. *Held*, that W.'s possession was not in subjection to the plaintiff's title, therefore it broke the continuity of the plaintiff's possession.

A legal estate obtained by fifteen years' adverse possession cannot pass by mere verbal surrender.

Where the rights of both parties stand upon mere possession not yet ripened into a perfect title, he who has the prior possession has the best right; but if he abandon and surrender it to the adverse party he cannot afterwards set it up.

EJECTMENT for the northerly part of lot No. 60, 2d division in Brunswick. Trial by jury, September Term, 1863, POLAND, Ch. J., presiding.

The plaintiff claimed to have bid this lot off at a tax sale October 2d, 1845, and testified that he received a deed of it from David Hyde, the constable and collector of the town of Brunswick, in the fall of 1846; and that he exercised acts of ownership over it in the winter and spring following; that in the spring of 1848, while at Woodstock attending court, Elisha Webster entered upon and took possession of said lot and fenced a portion of it; that upon his return he, the plaintiff, turned his cattle into the lot, and informed Webster that he claimed title by the tax sale above named, and that he had a deed of the same from Hyde, the collector; that Webster declared that he had paid the tax for which the lot was sold, and that he had a receipt for the same, and that the plaintiff and Webster then entered into an agreement by which Webster was to continue in possession the remainder of the season of 1848, and if he did not produce to the plaintiff his receipt of the payment of said tax he was to surrender up the premises to the plaintiff; that Webster never produced or exhibited such receipt, and that in the fall of 1848 he abandoned the

possession and never after claimed any right to the lot or had any possession of the same.

The plaintiff further testified that after Webster left the lot in 1848, he entered into possession and exercised acts of ownership down to 1860, when he sold and deeded the same to Joseph M. Amy; that Amy entered upon the lot and erected a small house thereon and resided there until May, 1862, when he sold and re-conveyed the same to the plaintiff; that after Amy removed from the premises, the house being unoccupied the defendants entered into possession of the house and land and have held possession of the same, and have taken large quantities of timber, wood, bark and stones from the same. The plaintiff did not produce any deed of the lot from David Hyde, the collector, and testified that the same was never recorded, but that the deed was burned in 1859, when his house was destroyed by fire.

The defendants traced the title to this half lot from 1809, when it was sold at a tax sale and conveyed by deed to Daniel Dana, down to the conveyance to E. F. Bailey, one of the defendants, in October, 1862, and gave evidence tending to prove that as early as 1823, Peter H. Gamsby, who had purchased of Charles Sperry, entered upon the north half of said lot No. 60, made some clearing, erected a log house, and resided thereon until his death about 1831 or 1832; that in March, 1830, he mortgaged the same to Asa B. Porter; that after his death and while his family were upon the premises, Solomon Heaton, under an assignment of the Peters mortgage and a purchase from the widow of Peter H. Gamsby of his interest in the premises, entered into the possession of said half lot and occupied the same till his death in 1835, and that after his decease his widow and family occupied it up to 1839, when they removed from Brunswick.

The defendants' evidence tended to prove that Peter H. Gamsby and the Heatons held uninterrupted possession of said half lot for a period of more than fifteen years. It did not appear that any person was in actual occupancy after the Heatons left Brunswick till 1844 or 1845, when Elisha Webster entered into possession of the lot under a deed from George B. Chandler, who was the assignee of Hezikiah G. Heaton, son of Solomon Heaton. Alva Heaton, the last of the Heatons to hold the title to this land, and who conveyed

to Elisha Webster May 19th, 1861, was a son of King Heaton, who died in 1854, leaving several children besides Alva, but it did not appear that they had ever claimed said land. It was shown that administration was granted upon King Heaton's estate in 1854, but nothing further was shown in relation to the condition or settlement of his estate, and it did not appear that his administrator had ever asserted any right or claim to said lot.

The defendants introduced the deed of this land from Webster to A. J. Congdon, dated July 16th, 1861, and the deed of Congdon to the defendant E. F. Bailey, dated October, 1862.

The defendants' evidence tended to contradict that of the plaintiff as to the surrender and abandonment of said half lot by Webster to the plaintiff in 1848, and to show that Webster continued to claim said lot and to execute acts of ownership thereon by turning his cattle upon it, getting wood, timber and stones from it down to the time he conveyed it to Congdon, which was shortly before his death.

No question was made but that, when the defendant, E. F. Bailey, entered into possession of said half lot in 1862, he entered under the title conveyed by Webster to Congdon, and by his authority.

The plaintiff then gave evidence tending to show that Peter H. Gamsby did not enter upon said half lot as early as 1823, and also that the Heatons left the possession of it as early as 1837 or 1838, and their united possession did not continue for the period of fifteen years. The plaintiff claimed that he had derived a good title to this half lot by an adverse possession of it from the fall of 1846 down to the spring of 1862, when the defendants entered into possession. But the court decided that the entry upon the lot by Webster in 1848 and his occupancy as stated by the plaintiff would interrupt his possession so that he has acquired no title by possession. To this the plaintiff excepted.

The court also instructed the jury that if Webster, under whom the defendants claimed, had no title except prior possession and surrendered and abandoned that to the plaintiff as he claimed, neither he nor his grantees could afterwards assert it against the plaintiff. But that if they found that Gamsby and the Heatons held uninter-

rupted possession of this half lot for a period of more than fifteen years, then it had ripened into a perfect title, and Webster holding under it would not be precluded from setting it up against the plaintiff by a mere verbal surrender and abandonment within fifteen years after such surrender.

The court also charged the jury that if they found that the united possession of Gamsby and the Heatons continued for more than fifteen years so as to create a valid title in the Heatons, then the deeds from Chandler, assignee of H. G. Heaton, and from Alva Heaton to Elisha Webster, would convey to him such an undivided interest in the premises as would enable him and his grantees to hold possession of the whole against the plaintiff, who was a stranger to that title and had attained no valid title by possession against it,—to which the plaintiff excepted.

Verdict for the defendants.

G. N. Dale and *J. Ross*, for the defendants, cited 2 Washburn's Real Property, p. 453, *et seq.*; 2 Smith's Lead. Cas. 470–474; *Doolittle* v. *Linsley*, 2 Aik. 155; *Hathaway* v. *Phelps*, *ib.* 84; *Warner, Adm'r*, v. *Page*, 4 Vt. 291; *Reed, Adm'r*, v. *Shepley et al.*, 6 Vt. 602; *Patchin* v. *Stroud*, 28 Vt. 394; *Hyde* v. *Barney*, 17 Vt. 280; *Crowell* v. *Bebee*, 10 Vt. 33; *Cushman, Adm'r*, v. *Jordon*, 13 Vt. 597; 1 Swift, 447; *Mattocks* v. *Stearns & Wife*, 9 Vt. 326; *Cox* v. *Ingleston*, 30 Vt. 258; *Roberts* v. *Morgan*, 30 Vt. 320.

H. Heywood, for the plaintiff.

ALDIS, J. I. The heir upon the death of the ancestor has a vested interest in the estate which he may immediately convey by deed. 3 Vt. 207; 17 Vt. 280. The grantee by the deed gets the title of the heir and stands in his place. He holds the land as the heir did subject to the lien (if any) of the administrator. To protect this lien the statute provides (G. S. p. 391, § 14) that when an administrator shall be appointed and assume the trust no action of ejectment shall be maintained by any heir until (1) there shall be a decree of the probate court assigning such lands to such heir, or (2) the time allowed for paying debts shall have expired, or (3) the administrator shall voluntarily surrender possession to the heir.

In this case the title (as the jury must have found) became vested in the Heatons. King Heaton, who thus was the owner of a part

of the land, died in 1854, leaving several heirs. One of them, Alva, deeded the land to Webster under whom the defendant claims. The interest of the heir thus passed to the defendant.

The defendant E. F. Bailey, being in possession sets up his title derived from Alva Heaton. The plaintiff shows that King Heaton, the father of Alva, died in 1854, and that an administrator of his estate was appointed; but nothing further was shown, and it did not appear that the administrator had ever asserted any right or claim to the lot.

Upon this single fact, that administration of King Heaton's estate was granted in 1854, the plaintiff claims that the defendant cannot set up his title derived from Alva Heaton. This goes upon the ground that he cannot sue in ejectment, and if so, cannot defend in ejectment by setting up that title upon which he could not sue. Without stopping to consider whether this conclusion is legally derived from the premises, it is sufficient that we hold that upon the facts stated he would not be precluded from suing in ejectment.

1. The defendant E. F. Bailey, was in possession of the premises when the plaintiff brought this suit. There is nothing to show that he was not in possession by the consent,—"the voluntary surrender" of the administrator. Possession will not be presumed to be wrongful,—but on the contrary, in the absence of all proof, will be attributed to a lawful origin.

2. The statute provides (G. S. p. 404, § 29) that the time to be allowed by the probate court for the payment of debts shall not in the first instance exceed one year from the time of granting letters of administration. Without proof we cannot presume that the probate court either exceeded the law or extended the time.

Here nine years have passed since the granting of letters of administration, so it may well be presumed that the time allowed for paying debts has expired. The period to which the probate court can extend the time for paying debts may not exceed three years and six months. G. S. ch. 53, §§ 29, 30, 31.

In the case *Hubbard* v. *Ricart*, 3 Vt. 207, the court held that the grantees of the heirs could sue in ejectment within two years after the granting of administration. There having been no interference by the administrator, his lien was presumed satisfied after a lapse of

two years. In that case as in this the party denying the right of the heir's grantee to the land, was a stranger to the title. If it were the administrator or a creditor of the estate that denied the right of the heir, the court would perhaps have more hesitation in presuming the lien of the administrator satisfied.

II. The entry of Webster and his occupancy of the lot in 1848 was in his own right and under a claim of title. It continued through the season and excluded the plaintiff. This was clearly an interruption of the plaintiff's possession.

The adverse possession which gives title must be continuous for fifteen years.

It is urged that Webster's possession in 1848 was by agreement with the plaintiff and virtually in subjection to the plaintiff's title. But the plaintiff's testimony even does not sustain this view. He says Webster claimed that he had paid the tax upon which the plaintiff claimed he had bid the lot off at the tax sale. Thus their claims were hostile. They then agreed that Webster should remain in possession the rest of the season, and if he did not produce his receipt for the payment of the tax he was to quit the premises at the end of the season. In the fall he quit without producing the receipt.

This agreement and Webster's failure to produce the receipt (which upon this point we assume to have been as the plaintiff testified) shows that Webster's possession was without right, but not that it was in subjection to the plaintiff's title. There is no agreement to hold under the plaintiff, no payment of rent in any form, no recognition of his right; on the contrary there is persistency in the hostile claim till the end of the season. During this period the plaintiff was out of possession and by his own agreement was to remain out till fall.

The court properly held that this interruption broke the continuity of the plaintiff's adverse possession, so that he could not tack his prior to his subsequent possession to make out the fifteen years.

III. If Gamsby and the Heatons had acquired title by fifteen years of adverse possession, such title thereby became perfect, and was as good as a paper title by the record from the original proprietors. It was no longer a mere possessory right. It had ripened into

a legal estate in fee in the land. This being so it is quite obvious that such an estate, such a title, cannot pass by mere verbal surrender.

IV. The ruling of the court, that Webster's prior possession of the lot for two or three years before the plaintiff's entry upon it would prevail over the defendants' subsequent possession for less than fifteen years, unless Webster gave up and abandoned his possession, stands upon a long established principle of the law. Where the rights of both parties stand upon mere possession not yet ripened into a perfect title, he who has the prior possession has the best right. The qualification of the rule, that if the party having the prior possession abandon and surrender it to the adverse party he cannot afterwards set it up, was fully explained to the jury.

Judgment affirmed.

WILLIAM MCGREGOR *v.* J. D. CHASE & SONS, AND WARREN C. LEWIS, WILLIAM B. MAY, SOLON S. GOULD, SAMUEL L. ADAMS AND HARRY GREGORY, *Trustees.*

Trustee Process. Assignment. Mortgage. Fraud.

The alleged trustees had taken bills of sale of certain property from the principal debtors, to secure them for debts which the principal debtors owed the trustees, and for liabilities the trustees had incurred in their behalf; but in lieu of these bills of sale, and for better security, the trustees took a deed of the principal debtors' real and personal property, conditioned to be void if the said indebtedness should be paid and the trustees indemnified for their liabilities. The trustees were to take full possession and control of the property, collect back accounts and demands, all of which were sold to the trustees and included in the conveyance, convert the personal property into money and pay off said indebtedness and liquidate said liabilities, and were to have the use and occupancy of all the real estate and fixtures for the purpose of completing jobs on hand, &c. *Held*, that this was not an assignment within the meaning of the statute, and therefore not rendered void by reason of non-compliance with its requirements.

There may be a transfer to a party to secure a liability incurred by him for the assignor or grantor, as well as to secure a debt due from the latter to the former.

The instrument in this case is a mortgage, and the power of sale contained therein does not essentially change its character.

Nor does the provision that the mortgagees are to have possession have that effect.

Nor would a subsequent change in the management of the property from what was designed, for the purpose of realizing more from it, render the deed void under the statute relating to assignments.

The deed was valid as to the creditors of the principal debtors, and the mortgagees could not be held as trustees either for moneys in their hands or that came to them, or for the property in their hands under the assignment, until their debts against the principal debtors were paid.

In order for the creditors to get the surplus, if any, in the hands of the trustees, they must redeem the property by paying the lien of the trustees.

If one of the trustees owed the principal debtors on book account at the time the deed was made, the same having been transferred to the trustees in the deed, they will hold it like other accounts until their lien is discharged.

TRUSTEE PROCESS. The commissioner found and reported that prior to August 5th, 1861, the principal debtors had given to the alleged trustees bills of sale of certain personal property as security for debts which they owed the trustees, and for liabilities that the trustees had incurred in their behalf; but the trustees being fearful that they had not taken sufficient possession of the property conveyed by those bills of sale, to enable them to hold it against subsequent attaching creditors, and the principal debtors being actuated by the same fears, and knowing that they were deeply embarrassed, on the said 5th of August conveyed to the trustees all their known, visible, attachable property, both real and personal, in lieu of said bills of sale.

This deed set forth the indebtedness of the principal debtors to the several trustees individually, and the liabilities incurred by them, and recited these several and individual debts and liabilities as the consideration of the conveyance, and described the property conveyed, consisting mainly of a machine shop, foundry, blacksmith's shop, dwelling houses, lumber, machinery, &c., together with demands, notes and unsettled accounts against persons named in said deed, and also all back accounts against any and all individuals. And authority was contained therein to the said trustees to collect said demands and accounts and give discharges for the same; said conveyance also included a certain contract for the delivery of a quantity of lumber; "to have and to hold the same property to the said Lewis, May, Gould, Adams and Gregory, to their use forever, conditioned, that if we well and truly pay said indebtedness to them,

and indemnify and save them harmless from all liabilities they are under and have incurred for us, then this conveyance to be void. And the said Lewis, May, Gould, Adams and Gregory are hereby authorized to take the full posession and control of the said demands, machinery and personal property, before described, and to collect said demands, and convert said personal property into money as soon as may be consistently, for the payment of our said indebtedness to them, and to pay off and liquidate the said liabilities they are under for us, before stated; and they are to have the use and occupancy of all said real estate and fixtures, for the purpose of completing any jobs on hand, and manufacturing any unmanufactured lumber and other stock on hand."

It appeared that this suit was commenced August 6th, the day after the execution of said deed.

The trustees took the property conveyed by this deed for the purpose of collecting the demands so conveyed, and of converting the personal property into money as soon as it could be consistently done, in order to pay the principal defendants' indebtedness to the trustees, and the debts of the principal defendants on which the trustees were liable, and for the purpose of preventing the creditors of the principal defendants from commencing suits and making costs and embarrassing the latter in their business by securing their claims.

The trustees were to complete the jobs, and manufacture the lumber and stock then on hand, and the trustees were to have the privilege of purchasing what stock was required for that purpose.

The management of the property as it had been previous to and at the time of the hearing did not accord with the understanding of the grantors and the grantees named in the deed, at the time the deed was made, but the grantors have ever acquiesced in the way in which it has been managed, giving as a reason, that, owing to the depression in business, the property could be better disposed of by continuing the business along as it has been done,—to which manner of managing the property neither the plaintiff in this case nor the other creditors ever assented.

The other material facts are stated in the course of the opinion.

At the March Term, 1864, POLAND, Ch. J., presiding, the plaintiff consented that a judgment be entered that the trustees be discharged

with costs, with leave to except thereto. A *pro forma* judgment was therefore accordingly entered,—to which the plaintiff excepted.

O. F. Harvey and *Ossian Ray* for the plaintiff.

The conveyance of all the defendants' property to the trustees in this suit by the deed of August 5th, 1861, is in form and substance an assignment for the benefit of creditors. Not being made for the benefit of all the creditors in proportion to their demands, and not being executed in the manner prescribed by the statute, the instrument is null as an assignment. This conveyance is to the trustees jointly—they cannot now retain the property on account of individual debts which some of the trustees may have against the defendants, or on account of individual liabilities which some of the trustees may be under for them. This case does not fall within the rule laid down in *Noyes* v. *Brown*, 33 Vt. 442.

The transfer of the defendants to the trustees, August 5th, 1861, was made expressly to hinder, delay and defraud creditors, among other purposes, and this with full *knowledge* and *participation* therein on the part of the trustees.

A sale of personal property or conveyance of land to defeat a creditor's execution is void, even though the purchaser or grantee may have paid a full consideration. 2 Kent's Com. 513; 4 do. 464; *Edgell* v. *Lowell*, 4 Vt. 412; *Worsely* v. *DeMattos*, 1 Burr, 474–5; *Kimball* v. *Thompson*, 4 Cush. 441.

J. Ross, for the trustees.

I. The conveyance by John D. Chase & Sons to the trustees, of August 5th, 1861, is not an assignment "for the benefit of creditors," within the scope and meaning of the acts of 1852 and 1855, relating to assignments, but is only a mortgage or pledge of the property directly to the trustees, as creditors, and is not void. *Peck & Co.* v. *Merrill and Trustees*, 26 Vt. 686; *Leitch* v. *Hollister et al.*, 4 Comstock, 211; *Dunham & Dimond* v. *Whitehall et al.*, 21 N. Y., 131.

II. The conveyance to the trustees is not void or voidable by reason of being intended or operating to hinder and delay creditors in the collection of their debts. *Edson* v. *Sprout and Trustee*, 33 Vt. 77; *Gregory et al.* v. *Harrington et al.*, 33 Vt. 241.

III. It was lawful for the trustees to take a conveyance of the defendants' property to secure the payment of their debts and liabil-

ities, and for the defendants to give such securities. The act performed being lawful and right, it matters not from what motives it was performed. *South Royalton Bank* v. *The Suffolk Bank*, 27 Vt. 505; *Chatfield* v. *Wilson*, 28 Vt. 49.

IV. The trustees in any event cannot be holden for the real estate, as that can only be reached by attachment and levy of execution, and was only conveyed to them in mortgage, nor for the notes and book accounts or other choses in action conveyed to them. Drake on Attachment, ch. 20, §§ 479 to 481; *Hitchcock* v. *Egerton*, 8 Vt. 202; *Bishop, Smith & Co.* v. *Trustees of Hart*, 28 Vt. 71; *Hunter* v. *Case et al. and Trustees*, 20 Vt. 195.

PECK, J. The question in this case is whether upon the facts reported by the commisioner the trustees are chargeable.

It is claimed on the part of the plaintiff that the deed executed to the trustees by the principal debtor is an assignment, and that it is void under our statutes relating to assignments. It is not claimed on the part of the trustees that there has been a compliance with the requirements of the statute regulating assignments for the benefit of creditors, but it is insisted that it is not an assignment within the meaning of that statute.

We are all of opinion that the deed is not an assignment within the meaning of the statute, and therefore not rendered void by reason of a non-compliance with its requirements. In order to come within the statute regulating assignments, there must be a trust created for the benefit of some person, other than the assignee or grantee. It has often been decided that a transfer directly to a creditor of the grantor or assignor, simply to secure a debt due from the latter to the former, does not come within the statute. The same rule applies where the sole purpose of the transfer is to secure a liability incurred by the assignee or grantee for the assignor or grantor. Such being the objects and purposes of the deed in question, it is not obnoxious to the provisions of the statute. The deed is a mortgage to secure debts which the mortgagor owed to the mortgagees, and liabilities which the mortgagees were under for the mortgagor. It is true it contains a power of sale in the mortgagees to accomplish that purpose, but that does not essentially change its character. Nor does the provision that the mortgagees are to have possession of the

real estate and fixtures mortgaged, to complete unfinished jobs and the manufacture of certain lumber conveyed, have that effect. As the property was situated, that was a reasonable provision to prevent waste and sacrifice, and to make the property more productive as a security. The commissioner finds that the property was not disposed of and the business closed as soon as was expected when the deed was executed, but was continued along in consequence of the depression in business, with a view to realize more out of the property, and that this was by the acquiescence of the parties to the transfer. This subsequent change of purpose and management of the property can not have the effect to render the deed void under the statute relating to assignments.

We do not find from the report, looking at the whole facts, that the deed was fraudulent in fact and void for that reason as against creditors. The trustees, some of them, had attached some of this property to secure their debts against the principal debtors. The principal debtors had arranged the suits by executing bills of sale of some of the property. These bills of sale were held at the time of the execution of the deed. Other bills of sale from the principal debtors were held at the same time by others of the trustees as security. The deed in question was taken in lieu of the bills of sale. Although it is found that the deed was taken by the trustees fearing they had not taken sufficient possession under the bills of sale to hold the property against creditors, and fearing it would be attached, yet it is evident the purpose was to secure themselves and get a preference over other creditors. This the trustees had a right to do, and the principal debtors had a right to give such preference. There is no such corrupt purpose to defraud creditors found by the commissioner as will avoid the deed.

The deed being valid, and it not being claimed by the counsel for the plaintiff that the trustees have realized enough to pay their claims and liabilities, the trustees cannot be made chargeable on account of moneys in their hands, or that have come to their hands under the assignment. But it is insisted that the trustees should be made chargeable for the property in their hands under the assignment. But as mortgagees the trustees have a right to hold the security till their debt is paid. If the creditor claims there is a surplus

of property, he must redeem it by paying the lien of the trustees. This he did not do, or offer to do, in the county court; nor does he make any such offer now.

It is claimed, however, that the deed is to the trustees jointly, and that they cannot hold the funds and property for their several debts against, and liabilities for, the principal debtors. The deed, it will be seen, recites these several and individual debts and liabilities, as the consideration of the conveyance, and they are referred to in the rendition of the deed. These debts and liabilities, though several, come clearly within the scope of the mortgage deed.

It appears that as to Gregory, it was supposed by the parties to the conveyance, at the time the deed was executed, that the principal debtors were indebted to him. How the fact was at the date of the deed does not appear by the report; but the report shows that at the time of the hearing before the commissioner, Gregory was indebted to the principal debtors $1,668.64. The plaintiff claims that Gregory should be held chargeable for that sum. It appears that Gregory was at the date of the deed liable for the principal debtor, but in what sum does not appear. That indebtedness was afterwards satisfied out of the principal debtors' property; but whether out of the property conveyed by the deed does not appear. But it also appears by the deed that all the principal debtors' book accounts were conveyed to the trustees. If this $1,668.64. was a book account, it was conveyed by the deed, and belongs to the other trustees, and can not be drawn out of Gregory's hands by the other creditors of the principal debtors till the lien of the other trustees is discharged. The most reasonable presumption is that this debt was a book account; for had it existed in notes or written evidences of debt, the parties would probably have known which way the balance was. We cannot assume it existed in some other form for the purpose of excluding it from the operation of the deed.

The $134.28, which the plaintiff's counsel insist the trustees should be made chargeable for, grew out of a transaction between May and Gould, two of the trustees, and the principal debtors. May and Gould became liable to Chamberlin & Fletcher for the principal debtors, and took from the principal debtors certain notes against Varney, Renfield & George as security, which they collected

and paid the debt to Chamberlin & Fletcher which left $134.28 balance in their hands. This balance, in pursuance of an agreement between May and the principal debtors, entered into at the time they took the notes, was paid to the West Concord Machine Shop Company. All this took place since the commencement of this suit. Whether the trustees, or any of them, could be made liable for this item or not if this item stood alone, it is not necessary to decide. It is clear that they cannot be made chargeable for it so long as upon the whole case there is no balance due from the trustees to the principal debtor.

There is no ground upon which the trustees can be made chargeable.

Several important questions have been discussed by counsel which would have arisen to be decided had the commissioner found that the transfer was fraudulent and void as against creditors. These questions we do not pass upon, as they are not material, as we do not hold the deed void.

Judgment of the county court discharging the trustees affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF LAMOILLE,

AT THE

AUGUST TERM, 1864.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUSTICE.
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

JOHN MORGAN *v.* NORMAN S. ADAMS.

Pleadings. Account. Partnership. Arbitration.

Where the parties to an action of account had, previous to the suit, adjusted any portion of their account, the defendant is not bound to plead specially as to that portion, that he has accounted. The whole account may go before the auditor, and the defendant has the benefit of the evidence so far as it shows he has accounted.

If there was a single item left unadjusted, the defendant cannot plead in bar of a judgment to account, that he does not owe the plaintiff.

A general settlement of a partnership account is a sufficient consideration for a withdrawal of a disputed item by one of the parties, to render the final adjustment binding.

Morgan *v.* Adams.

The transaction in this case at the meeting of the parties and arbitrators, was a settlement and payment by the parties, and not an award of arbitrators.

THIS was an action of account between partners. Judgment to account was rendered, and an auditor was appointed, who reported that he disallowed all the defendant's account, and all the plaintiff's account except item No. 14, in respect to which he reported that in July, 1861, the plaintiff and defendant entered into a co-partnership for buying and selling cattle and sheep; that this co-partnership continued for about twenty-two months; that it was understood between them that they should consult together about the propriety and expediency of making purchases; that in November, 1861, the defendant requested the plaintiff not to buy any more cattle then, as the state of the market at that time rendered it probable that they could not make any profit upon cattle purchased at that time; that the plaintiff however obtained money on a partnership note and bought twenty-eight head of cattle, and they were sent to market and there was a loss on them of about $90.; that there was some evidence that the defendant recognized this as a partnership transaction, but not sufficient to satisfy the auditor that he did, or meant fully to adopt and ratify it; that the parties on or about the 11th of June, 1863, agreed to submit the matters of difference between them to three arbitrators named; that when they met for the hearing, the parties went on and settled many items themselves, and each paid to the other the amount of each item as they proceeded and agreed upon them.

There were some items upon which the parties did not agree, and which they called upon the persons chosen as arbitrators to award, which they did, and the balance found in favor of the plaintiff, so far as those items were concerned, the defendant immediately paid over to the plaintiff. It was understood by the parties and the said persons, that all matters of difference were then adjusted between them, so that neither had any claim upon the other, unless something was due on money which had been loaned to Charles and Lyman Martin, of Montgomery, by the plaintiff and defendant; and the auditor found that there was nothing due either party in any way growing out of that loan.

At the same time the parties executed to each other receipts, as follows:

"EDEN, June 11th, 1863.

"Received of John Morgan fifty dollars in full of all demands up to this date, except four hundred dollars Martin money."

The auditor further found that on the hearing and transaction before the persons chosen as aforesaid, the item of "loss on cattle" was mentioned by the plaintiff as a claim that the defendant *ought* to stand in for, and allow; but on its being objected to by the defendant, the plaintiff said he could stand it *all* himself, and it was then understood by both parties, and by the arbitrators, that the plaintiff abandoned his claim for "loss on cattle" which is the same charged in his account now presented.

The auditor found that if the defendant ever was and now is holden to pay half the loss on the twenty-eight head of cattle, there is due from him to the plaintiff to balance their accounts, $51.75; otherwise there is nothing in arrear from either party.

The plaintiff claimed before the auditor that the defendant could take no advantage of an arbitration and award, as nothing of the kind had been plead in bar of the action, but no objection was made to the proofs offered of the facts reported. The auditor did not find that there was an arbitration and award. There was no evidence before the auditor that there was any demand made by the plaintiff on the defendant to balance accounts between them previous to the commencement of this suit; and no allusion was made to the fact, nor claim made that it was necessary until the defendant's counsel mentioned it in argument.

Other facts are stated in the opinion.

Upon the report of the auditor the court, at the May Term, 1864, ALDIS, J., presiding, rendered judgment for the defendant,—to which the plaintiff excepted.

Brigham & Waterman, for the plaintiff, cited to the point that the defendant having suffered judgment to account to pass by *nil dicit*, is barred from pleading before the auditor an award of arbitrators, or release, or accord and satisfaction,—*Bishop* v. *Baldwin*, 14 Vt. 145; that item No. 14 was not passed upon or settled. Chitty on Con. 277; *Cumber* v. *Wayne*, Strange 426; *Fitch* v. *Sutton*, 5

East, 230; *Heathcote* v. *Crookshanks*, 2 Term, 24; *Wright* v. *Allen*, 4 Vt. 572; *Shaw* v. *Clark*, 6 Vt. 507; *Wheeler* v. *Wheeler*, 11 Vt. 60; *Goodwin & Co.* v. *Follett*, 25 Vt. 386; *Dederick* v. *Leman*, 9 Johns. 333; *Howe* v. *Mackay*, 5 Pick. 44; *Colburn* v. *Gould*, 1 N. H. 279.

The plaintiff was not bound to prove a demand before the auditor. If he in fact made no demand, the defendant was under no obligation to account, and if he would avail himself of such an objection he must plead it specially in bar of the action before judgment to account is rendered. 1 Stephens N. P. 3; *Baxter* v. *Thompson*, 26 Vt. 559; *Bishop* v. *Baldwin*, 14 Vt. 145; *Pickett* v. *Pearsons*, 17 Vt. 470; *Chadwick & Co.* v. *Divol*, 12 Vt. 499.

G. W. Hendee and *W. G. Ferrin*, for the defendant.

PECK, J. The question presented is whether the county court erred in rendering judgment for the defendant on the report of the auditor. If the defendant had a right to rely on the facts reported, after having submitted to judgment to account, there can be no doubt but that the defendant is entitled to judgment on the report, unless the facts reported as to item No. 14 in the plaintiff's account entitle the plaintiff to recover for that item. As to items in the plaintiff's account Nos. 1, 2, 3, 4, 5, 6, 7, 9, 11, 13, 15, 23, 24, 25 and 26, the auditor finds there never was any right to make the charge; and as to items 21 and 22, he finds that they were concerning matters disconnected with the partnership deal. Thus far no question is raised by the counsel for the plaintiff. Items No. 8, 10, 12, 16, 17, 18, 19 and 20, it appears from the report, were settled and adjusted, and the balances paid after the partnership closed, in a general settlement of all unsettled matters between the parties, except a $400 item consisting of money loaned to Martin; and that on that occasion the parties executed receipts to each other in full of all demands, "*except four hundred dollars Martin money*," so called in the receipts.

The only question made by the plaintiff's counsel upon the merits, aside from the question of the admissibility of the defence after a judgment to account, is upon item No. 14, being $45, for half the loss on a lot of cattle bought and sold. These cattle, it appears, were purchased by the plaintiff during the existence of the co-part-

nership, with money raised by the plaintiff on a note signed by him in the name of the co-partnership. At the time the plaintiff purchased these cattle, the defendant had expressed to him a desire or wish that he would not buy any more cattle as the market then was. The auditor finds that the defendant never fully recognized this as a partnership transaction. Assuming that the plaintiff, had he insisted on it, had a right to treat this as a co-partnership transaction, yet it was competent for the parties, in a general settlement, by agreement to exclude it from the company dealings, and for the plaintiff to assume it as an individual transaction of his own. It appears that at the time of this general settlement the plaintiff claimed this item, and the defendant objected to it; whereupon "the plaintiff said that he could stand it all himself, and it was then understood by both parties that the plaintiff abandoned his claim" for this item.

It is further found by the auditor that in that settlement it was understood by both parties that all matters of difference were then adjusted between them, so that neither had any claim upon the other unless something was due on account of money they had loaned to Martin. It is insisted on the part of the plaintiff that there was no consideration for the abandonment of this item, and therefore the plaintiff is not bound by it. But the general settlement which is presumed to have been made on the faith of the plaintiff's withdrawal and abandonment of this disputed item, is a sufficient consideration to render this final adjustment binding. It is too late now for the plaintiff to assert the claim.

But it is insisted that the defendant should have pleaded in bar of a judgment to account, that he had fully accounted, and that he can not rely on this evidence before the auditor. How this would be if it appeared that the defendant had *fully* accounted, it is not necessary to decide, as it appears that he had not fully accounted. The Martin money, which was a partnership matter, was expressly excepted in the settlement and in the receipts executed by the parties. If the defendant had pleaded that he had fully accounted, the proof would not have supported the plea. One item having been excepted in the accounting would have as effectually defeated the plea, as if but one item only had been adjusted, and all the rest left open. When only a portion of the account has been adjusted, the

defendant is not bound to plead specially as to that portion of the account, that he has accounted. In such case, as an auditor must be appointed to adjust the residue of the account, the whole may properly go before the auditor, and the defendant has the benefit of the evidence, so far as it shows he has accounted. It is true that the auditor does not find either party in arrear on account of the Martin money; but that makes no difference. It is sufficient that it was a partnership dealing, and was expressly excepted in the settlement, and left open for future adjustment. The defendant cannot plead in bar of a judgment to account that he does not owe the plaintiff, because such plea would draw the accounting from the auditor to the jury. The auditor does not state specifically the facts in relation to the Martin money, or upon what particular facts he finds nothing due in respect of it. It may be the ground was that each party had received his just share. How the accounts stood between the parties as to this money at the time of the adjustment of the rest of the account does not appear. It may be that at the time of the settlement one was indebted to the other on account of it, and that the latter received the residue of his share afterwards before the hearing before the auditor. But this is not material, as the item was not adjusted in the settlement, and the defendant had not accounted in relation to it.

The question whether an award of arbitrators can be given in evidence as a defence before auditors, does not arise in the case, as no award was made. The parties agreed to submit all matters to three arbitrators named, and the parties and arbitrators met for that purpose, and pending the hearing the parties settled. On some items which the parties failed to adjust, they took the opinion of the arbitrators, and as to those items settled on the basis of that opinion. The substance of the transaction was a settlement and payment by the parties, and not an award of arbitrators.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF CALEDONIA,

AT THE

AUGUST TERM, 1864.

PRESENT:

HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

W. R. DANFORTH & CO. *v.* G. B. WALKER.

Contract. Damages. Statute of Fraud.

The defendant contracted with the plaintiffs for a quantity of potatoes to be delivered during the winter as called for by the defendant. Before they were all purchased by the plaintiffs the defendant notified them by letter not to purchase any more potatoes until they should hear from him. This order was never countermanded. *Held*, that this letter was not a rescinding of the contract, but a refusal to receive any more potatoes upon it than the plaintiffs had on hand, or had already purchased.

Quere, whether the contract was binding within the statute of frauds. If binding, the rule of damages for the breach on the part of the defendant as to the requisite quantity to be purchased by the plaintiffs when they received said letter would be the difference between the price the defendant had stipulated to pay, and what it would have cost the plaintiffs to procure and deliver the potatoes according to the contract.

Danforth et al. v. Walker.

In executory contracts, a party has the power to stop the performance on the other side, by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part, at that point or stage in the execution of the contract.

ASSUMPSIT for breach of contract in not taking a quantity of potatoes agreeably to the contract between the plaintiffs and defendant. Plea, the general issue, and trial by jury, June Term, 1864, ALDIS, J., presiding.

A question raised on trial in respect to certain evidence was abandoned in the supreme court.

It appeared on trial that about the 18th day of January, 1859, the defendant made a verbal contract with the plaintiffs to purchase of them five car loads of potatoes, being fifteen hundred bushels, to be delivered on the cars at Stratford depot, N. H., as soon as the defendant should call for them, and as soon as he could get them away, sometime during the winter. Five or six hundred bushels were then in the store cellar of the plaintiffs and were examined and approved by the defendant when he made the contract. The rest the plaintiffs were to buy and have ready for the defendant as soon as he should call for them. The defendant was to take them as soon as he could. No memorandum of the contract in writing was made or signed by either party. It appeared that soon after the contract was made, or after the first car load was taken, potatoes fell in the market. On the 27th day of January, 1859, the defendant wrote to the plaintiffs directing them not to purchase any more potatoes till they should hear from him.

It also appeared that at the time the letter was received the plaintiffs had some seven hundred or eight hundred bushels of potatoes on hand, and had made contracts for the delivery of other potatoes. About the 16th of February following the defendant took four hundred bushels, and afterwards in May sent a check on Boston to pay for them at the contract price; which were all the potatoes that were ever taken; but at that time when the defendant took the four hundred bushels on the 16th or 17th of February, 1859, he took them upon the contract, and then and afterwards treated the contract as being in force as originally made, and at no time objected that potatoes had been bought after the letter of January 27th was re-

ceived, and in March wrote to the plaintiffs to sell the potatoes for him.

The defendant never gave to the plaintiffs any order or authority to purchase any more potatoes upon the contract after the letter of January 27th, nor did the plaintiffs agree to vary the contract and comply with the request in that letter.

The plaintiffs had not purchased enough potatoes to fill the contract when they received the letter of January 27th. The terms of the contract did not appear in the correspondence between the parties, subsequent to the making of the contract. The request of the defendant to the court and the charge in respect thereto are fully set forth in the opinion of the court. Verdict for the plaintiffs. To the refusal to charge as requested, and to the charge as given, the defendant excepted.

A. J. Willard and —— *Bartlett*, for the defendant, claimed that the defendant was entitled to have the charge as requested for the reason that when the letter was written there was no contract that the law recognized or upon which he was liable, and if the plaintiffs after that purchased any potatoes he was not bound to take them, unless by subsequent agreement, or unless he became bound by subsequent acts. *Ide & Smith* v. *Stanton*, 15 Vt. 685; Brown on Frauds, pp. 353 and 355.

G. C. & G. W. Cahoon, for the plaintiffs, maintained that the contract was rendered binding in law upon both parties by the acceptance of a part of the potatoes by the defendant. G. S. p. 453, § 2; *Green* v. *Merriam*, 28 Vt. 801; *Spencer* v. *Hale*, 30 Vt. 314; *Gorham* v. *Fisher & Roberts*, 30 Vt. 428; *Packer* v. *Steward*, 34 Vt. 127; and that the charge of the court was correct. *Blish et al.* v. *Granger*, 6 Vt. 340; *Hammond* v. *Buckmaster*, 22 Vt. 375; *Fletcher* v. *Cole*, 23 Vt. 114; *Paige* v. *Fullerton Woolen Co.*, 27 Vt. 485.

PECK, J. The exception to the decision of the court excluding certain evidence offered by the defendant, is not insisted on in argument.

The only question for this court to decide is as to the charge to the jury. The defendant requested the court to instruct the jury that the defendant was not liable for damage for any potatoes purchased by the plaintiff after the defendant's letter to the plaintiff of

January 27th, directing the plaintiffs to purchase no more. The court refused this, and instructed the jury that the defendant was liable in damage for all the potatoes purchased, and that although potatoes fell in the market, the plaintiffs had a right to go on and purchase potatoes to the full amount of the contract, and the defendant was bound to take them or pay the damage.

The contract being verbal, and no payment or delivery, or anything given in earnest to bind the bargain, and there being no memorandum of the contract in writing, it was within the statute of frauds, at the time it was made on the 18th of January. A subsequent written acknowledgement of the contract, signed by the party to be charged, is sufficient to take such contract out of the statute. But to have that effect, such written admission must contain substantially the terms of the contract. The defendant's letter of January 27th, together with the subsequent correspondence, is not a sufficient compliance with the statute, as the terms of the contract do not appear in any of the letters of the defendant. The delivery and acceptance of the four hundred bushels of potatoes in February, and the subsequent payment for the same in May following, was such part delivery and payment as answer the requirement of the statute. If nothing more appeared, it would be clear that the contract thereby became binding according to its terms, and to the extent of the original verbal agreement. But the defendant's letter of January 27th directing the plaintiffs not to buy any more, is equivalent to a refusal to accept any more potatoes on the contract than what the plaintiffs had on hand and had already purchased. It is also stated in the exceptions that the defendant never after the date of that letter authorized the plaintiffs to purchase any more. Upon these facts alone, it is questionable whether the delivery and payment above mentioned would give binding force to the contract beyond the quantity the plaintiffs had on hand when the contract was made, and what they had subsequently purchased up to the receipt of the letter of January 27th. But as it is stated that the four hundred bushels delivered February 18th or 19th, were taken by the defendant upon the contract, and that he then and afterwards treated the contract as being in force as originally made, we are not prepared to say that the statute of frauds can avail the defendant.

Suppose the contract taken out of the statute of frauds, what are the rights of the parties?

The letter of January 27th directs the plaintiffs to purchase no more potatoes on the contract till they hear from him. This direction never was countermanded. This is equivalent to a refusal to accept any more potatoes than the plaintiffs had on hand and what they had already purchased; and the plaintiffs were bound so to regard it. At this time the plaintiffs had on hand seven hundred or eight hundred bushels, and had made contracts for the delivery of other potatoes; but it does not appear that these contracts, together with what the plaintiffs had, were sufficient to make up the whole amount of fifteen hundred bushels. On the contrary it appears by a schedule referred to showing the quantity and dates of the plaintiffs' purchases, that purchases made by the plaintiffs after the receipt of that letter, must necessarily be included to make up the fifteen hundred bushels. That letter cannot be treated as a rescinding of the contract. The plaintiffs having committed no breach of the contract to justify the defendant's refusal, might have rescinded the whole contract on the receipt of that letter, but they did not so elect, as they made a delivery under it in February after. This they had a right to do and still hold the defendant liable for breach of the contract. It is evident from the terms of the letter that the defendant did not intend to rescind the contract. It is but a refusal to receive any more potatoes upon the contract than the plaintiffs had on hand or had already purchased. As to what the plaintiffs had on hand, or had purchased when they received that letter, and which the defendant did not receive and pay for, no question is reserved. It is as to what the plaintiffs purchased afterwards to make up the fifteen hundred bushels, that the question arises. This refusal on the part of the defendant was a breach of the contract, as it prevented the plaintiffs from making further purchases, and delivering to the full extent of the fifteen hundred bushels the defendant had agreed to accept and pay for. The rule of damages for this breach, so far as it respects the requisite quantity then still to be purchased to fill the contract, would be the difference between the price the defendant had stipulated to pay, and what it would have cost the plaintiffs to procure and deliver the potatoes on the cars; in other words, what would make the plaintiffs

good for being thus far stopped at that point in the execution of the contract. The plaintiffs had no right to go on and make further purchases and incur expense, and throw the risk of the property upon the defendant, and thereby enhance the damages at the expense of the defendant, without any benefit to the plaintiffs. They had no right to increase the burden of the defendant without benefit to themselves. The damage a party is entitled to recover for the breach of contract by the other party, is what he *necessarily* suffers in consequence of it. While a contract is executory, a party has the power to stop the performance on the other side, by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such increased damages of the other party. The jury under the charge must have given the plaintiffs such damages as they sustained by the non-acceptance *of*, and payment *for*, the whole fifteen hundred bushels of potatoes, except the four hundred bushels accepted and paid for, the plaintiffs being left with the potatoes on their hands. This was the right rule as to all the plaintiffs had on hand, or had purchased at the time they received the letter of January 27th, but not as to what they purchased afterwards. As to the latter quantity, The plaintiffs were entitled to recover what damage they would have sustained if they had not purchased them. It is urged that the case shows that when the defendant received the four hundred bushels, and afterwards, he treated the contract as in force. It is true that it was in force, as it had not been rescinded. It must be in force in order to entitle the plaintiffs to recover any damages. It was in force, but subject to the defendant's refusal to receive any potatoes upon it, purchased by the plaintiffs after the receipt of the letter of January 27th. That direction or refusal was never revoked or waived, as the exceptions show that the defendant never gave the plaintiffs any order or authority to purchase any more, after the letter of January 27th forbidding any further purchases. The plaintiffs' counsel rely on the fact that the defendant in the spring requested the plaintiffs to sell the potatoes, and that he never claimed that they were bought after

he directed the plaintiffs not to make any more purchases. But the case does not show that the defendant was informed that any purchases were made after he forbid any more purchases, and certainly he was not bound to presume it.

Judgment reversed and new trial granted.

MARTHA WELLS v. ISAAC R. HOUSTON.

[IN CHANCERY.]

Chancery. Practice. Adverse Possession.

Where the answer is not responsive to the bill, or sets up affirmative allegations in opposition to, or in avoidance of, the plaintiff's demand, and is replied to, the answer is of no avail in respect to such allegations, and the defendant is as much bound to establish the allegations so made, by independent testimony, as the plaintiff is to sustain his bill.

The oratrix claimed title by adverse possession. The defendant, to avoid this title, set up the right of the town to the proprietary right of the first settled minister, and that he entered upon the premises under direction of the town as one of the selectmen. *Held*, that this was not responsive to the bill, and not being sustained by proof, the defendant failed to connect himself with the title of the town, therefore he could not stand upon that title.

BILL IN CHANCERY. The oratrix alleged in her bill that she and those under whom she claimed title, had had and occupied lot No. 1, in the 12th range, belonging to the minister right in the town of Victory, for nearly forty years, claiming to own it and not acknowledging the title of any one else, and that until within the last three years their occupation has been uninterrupted and exclusive; that she and they have made great and permanent improvements on the lot, by clearing, erecting buildings, planting trees, &c.; that in the year 1860, the selectmen of Victory claimed this lot and took charge of the same by virtue of the authority given them in chapter eighty-nine of the Compiled Statutes; that the oratrix claimed to be the owner of the same, and in order to settle and forever determine the title thereto the oratrix and the selectmen made a written submission to the Hon. L. P. Poland, in which they agreed that his award should be final and conclusive, and that they would each abide by the same;

that upon the hearing said arbitrator adjudged that the oratrix, Martha Wells, had acquired a good title to said lot as against the town of Victory; that the defendant, Isaac R. Houston, of Victory, was present, aiding the town in said arbitration, and knew of the award therein; that not content with the decision in relation to the title said town undertook to settle one Jacob Evans, a Methodist deacon, as minister of the town, and through him again claim the lot, and for that purpose commenced a suit in ejectment in the name of Evans against the oratrix; that this suit resulted in a judgment in favor of the oratrix; that Houston was chief advisor of the town in the settlement of Evans and the prosecution of said suit; that the defendant combining, &c., on the 24th of June, 1863, entered upon said lot and cut and carried away a large quantity of timber, and has since then taken away other timber, and threatened to commit such acts upon said land until the oratrix should abandon and give up the possesion thereof to him: and the oratrix prayed for an injunction upon said Houston and his servants, commanding them to desist from cutting timber from said lot, or in any way interfering with the possession of said lot.

The defendant in his answer denied the material allegations of the bill, and for further answer said in substance, that the charter of the town of Victory was granted in 1781; that by said charter certain rights were reserved for certain described purposes; that one right was for the purpose of the settlement of a minister of the gospel; one for the support of the worship of God; and one for the support of schools; that in October, 1798, the proprietors of the township caused the lands for these purposes to be laid out and surveyed according to the directions and authority given in said charter; that lot No. 1, in the 12th range, 2d division, was drawn to the right for the settlement of a minister or ministers; that since the granting of the charter the town has been duly organized as a town by the name of Victory, and that he was one of the selectmen of the town during all the time the oratrix charges him with entering upon the lot, and that by direction of the other selectmen, and under the authority conferred upon selectmen by the statutes of this state, and also by the direction of the inhabitants of the town, he entered upon said lot under said charter, and that this is the right and title under which

the defendant claims to justify his acts in relation to said lot. The answer was traversed, and the plaintiff supported the allegations of the bill by proof. But no proof was offered by the defendant in support of his answer.

The court of Chancery, at the March Term, 1864, POLAND, Chancellor, decreed that the defendant, Houston, be perpetually enjoined from entering upon said lot, or in any way interfering with the possession thereof, and that the complainant recover her costs,—from which decree the plaintiff appealed.

——— *Harvey* and *George N. Dale*, for the defendant.

William Heywood, for the oratrix.

KELLOGG, J. The oratrix, in her bill, sets up a right or title to the premises in controversy by occupancy, by herself and those under whom she derives or claims her title, peaceable and uninterrupted, and adverse to all others for nearly forty years. This would make an invincible title against all persons but the true owner. To avoid this title, the defendant, in his answer, sets up the right of the town of Victory to the proprietary right for its first settled minister, granted in its charter, and that the premises in controversy were set to that right in the proprietary division of the town, and that the defendant entered on the premises as one of the selectmen, and by direction of the other selectmen, of the town, in the right and behalf of the town. This defence consists wholly of matter which is new and not responsive to the oratrix's bill; and the defendant's answer is traversed. A ground of defence relied on in the answer, but not being responsive to the bill, must be sustained by proof. Where the answer is not responsive to the bill, or sets up affirmative allegations in opposition to, or in avoidance of, the plaintiff's demand, and is replied to, the answer is of no avail in respect to such allegations, and the defendant is as much bound to establish the allegations so made, by independent testimony, as the plaintiff is to sustain his bill. *Mott* v. *Harrington*, 12 Vt. 199; *Cannon et al.* v. *Norton*, 14 Vt. 178; *Lane* v. *Marshall et al.*, 15 Vt. 85; *Pierson* v. *Clayes et al.*, 15 Vt. 93; *McDonald* v. *McDonald et al.*, 16 Vt. 630; *Allen, Adm'r*, v. *Mower*, 17 Vt. 61; *Sanborn* v. *Kittredge, et al.*, 20 Vt. 632; *Wakeman* v. *Grover*, 4 Paige, 23; 2 Daniell's Chancery Pleading and Practice, (Perkins' third Amer. edit.,) 841, *note*. The case stands for hearing

on the bill, answer, and the proofs on the part of the oratrix. The defendant makes no proof whatever to sustain the defence which he sets up. He does not even furnish proof to show that the premises in controversy were set out in the proprietary division of the town to the right of its first settled minister. The mere fact that the lot was called the minister lot does not of itself prove anything more than that this was the *name* of the lot: it does not prove that the lot was allotted to the minister right. As the defendant makes no proof, he does not by proof connect himself with the right or title of the town. The allegations of the bill which are denied by the answer of the defendant are, in substance sustained by the oratrix's proofs. As the defendant fails to connect himself with the title of the town, he cannot stand upon that title, but is to be treated as a stranger intruding upon a party in possession; and the oratrix is entitled to the interference of the court of chancery in her behalf, to prevent a succession of suits, and to suppress useless, vexatious and interminable litigation, arising from a renewal of acts of trespass on the premises threatened by the defendant. 2 Story's Eq. Jurisp., (Redfield's edit.,) §§ 901, 918, 919, 959.

The oratrix by her bill makes her claim not against the town, but against the defendant, who does not by any proof connect himself with the right or title of the town. A part of the court are of the opinion that, after a quiet occupancy for such a length of time as the oratrix has shown in this case, a grant of the legal title to the premises ought to be presumed in her favor. *University of Vermont* v. *Ex'r of Reynolds*, 3 Vt. 542, 558, *et seq.*; but inasmuch as a determination upon this point, or upon the validity of the arbitration and award referred to in the bill, is not necessary to support the judgment now ordered, and as all of the Judges now present concur in this judgment on the other grounds above stated, no opinion is intended to be expressed on those points as the judgment of the court.

The decree of the chancellor in favor of the oratrix, by which she is allowed the relief sought for in the prayer of her bill, is affirmed; and the case will be remitted to the court of chancery for the purpose of perfecting the decree.

DANIEL W. AIKEN *v.* FREDERICK T. BRIDGMAN.

Pleading. Parties. Offset.

An administrator may sue to recover the price of property belonging to the estate of his intestate and sold by himself personally, without naming himself as administrator, or joining his co-administrator.

In such a case the defendant cannot plead in offset a claim in his favor against the estate of the plaintiff's intestate.

ASSUMPSIT in the general counts for property sold the defendant, a part of which belonged to the estate of Samuel Aiken. Plea, the general issue and a declaration in general assumpsit in offset. Trial by jury, June Term, 1864, POLAND, Ch. J., presiding.

It appeared that the plaintiff and his brother, Solomon Aiken, were joint administrators of the estate of Samuel Aiken at the time said property was sold to the defendant, but that most of the business in selling said estate was done by the plaintiff. These items were of such amount that if disallowed the balance would be with the defendant.

It appeared that the plaintiff alone sold the property belonging to Samuel Aiken's estate to the defendant.

The defendant claimed that the plaintiff could not recover in his own name for property sold the defendant belonging to said estate, and insisted that recovery for the same could only be by joint action in favor of both administrators; but the court overruled the objection and charged the jury that if the plaintiff made the sale of such property himself, doing the business alone, and the co-administrator, Solomon, had nothing to do with such sale, the plaintiff might recover in his own name in this action for the property so sold the defendant by the plaintiff, though it belonged to the estate of Samuel Aiken,—to which the defendant excepted.

The evidence tended to prove a valid claim in favor of the defendant against the estate of Samuel Aiken, but the defendant never presented this claim to the commissioners on said estate.

The defendant insisted that as a claim in offset to items of account in favor of said estate it was properly allowable in this suit, although

not presented to the commissioners, but the court excluded the defendant's claim from the consideration of the jury,—to which the defendant excepted.

Verdict for the plaintiff.

O. S. & C. C. Burke, for the defendant, insisted that the two administrators of Samuel Aiken's estate should have been joined, and cited 2 Black. Com. 182, 396; *Brinckerhoof* v. *Wemple*, 1 Wend. 470; *Halliday* v. *Doggett*, 6 Pick. 359; Story on Part. § 271; *Wright* v. *Williamson*, 978; *Mason* v. *Lord*, 20 Pick. 447; that the defendant could plead in offset his claim against said estate, and cited *Leavenworth* v. *Lapham*, 5 Vt. 207; *McDonald* v. *Webster*, 2 Mass. 498; *Bordman* v. *Smith*, 4 Pick. 212; *Knapp* v. *Lee*, 3 Pick. 452; *Jarvis* v. *Rogers*, 15 Mass. 407; *Way* v. *Wakefield*, 7 Vt. 228; 1 D. Chip. 157.

B. N. Davis, for the plaintiff.

KELLOGG, J. An administrator may sue to recover the price of property belonging to the estate of his intestate and sold by himself personally, without naming himself as administrator, or joining his co-administrator. *Brassington et al.* v. *Ault*, 2 Bingh. 177, (9 E. C. L. 369;) *Heath* v. *Chilton*, 12 Mees. & W. 632; 1 Saund., (Patteson & Williams' edition,) 291, k. note (m.;) 2 *ib.* 47, x. note (t.;) 2 Greenl. Ev., § 338. The privity of contract in such a case is not between the purchaser and the estate of the intestate, but is between the purchaser and the administrator of whom he purchases the property. The contract is between the parties as individuals, and is personal as between them, though, in some cases, the administrator has the option of suing either in his representative or his personal character. *Cowell* v. *Watts*, 6 East, 405. We think that the jury were correctly instructed that the plaintiff could recover in an action in his own name for the price of the property of his intestate which he sold to the defendant personally, if he made the sale alone, and his co-administrator had nothing to do with the sale.

The evidence on the trial tended to establish a valid claim in favor of the defendant against the estate of the plaintiff's intestate, which was relied on by the defendant under his plea in offset. Assuming

that the plea is sufficient in form, and is broad enough to include the claim, we think that there are two decisive objections to the offset claimed. (1.) The form of the action limits the right of offset to the claims of the defendant against the plaintiff in his individual or personal, and not in his representative, character. (2.) A defendant is not allowed to set off a debt due to him from the plaintiff's testator against a debt which accrued to the plaintiff in his representative capacity, after the testator's death; for this would be altering the due course of the distribution of assets, and the defendant might thus be indirectly paid before creditors of a higher degree. *Kilvington, Ex'r*, v. *Stevenson*, cited in Willes, 264, n. (a.) The plaintiff's claim is for the price of property belonging to the estate of the intestate which was sold by the plaintiff to the defendant after the intestate's death. The defendant's claim in offset is one which he might, and should, have presented to the commissioners of claims against the intestate's estate for allowance. If the claim had been allowed by the commissioners, it would have had no priority over the other claims allowed against the intestate's estate; but, if the defendant's offset should be sustained, he would, to that extent, receive full payment upon his claim, when in fact it might be that he would be entitled only to a dividend upon it. In *Rees* v. *Watts, Adm'r of Watts*, 11 Exch. 410, it was held that to an action by an administrator who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. And this doctrine holds, whether the plaintiff declare as executor, or sue, as he may do, in his private character for the debt which accrued due to him since the testator's death. *Shipman* v. *Thompson*, Willes, 103. Chitty on Contracts, (10th Amer. edit.,) 956.

Judgment of the county court for the plaintiff affirmed.

ISAAC WOODS *v.* HENRY PAGE.

Arbitration. Costs.

In an arbitration of "all matters of difference between the parties," including a suit previously brought, if the arbitrators find that the balance due, both at the time of the suit and of the arbitration, was against the plaintiff, they need not specify what the balance was when the suit was brought as affecting the question of costs.

If the parties to an arbitration, upon the trial before the arbitrators, submit by *mutual consent* matters not included in the written submission, and thereupon the arbitrators try the matters so verbally submitted and make their award, neither party can object that the award exceeded the submission.

DEBT upon a lease under seal, and common counts in debt added. Plea, *nil debit*, and also a special plea setting up a submission to arbitrators and an award thereupon. The plaintiff joined issue upon the first plea, and replied to the second plea, that the arbitrators in making their award did not follow the submission. The defendant rejoined that the award was made according to the submission. Trial by the court, June Term, 1864, POLAND, Ch. J., presiding. It was agreed by the parties that the trial should be confined wholly to the defence set up under the defendant's special plea.

An arbitration bond was given in evidence, reciting an agreement to submit the suit and all matters in difference, to certain persons named. And it further appeared that the plaintiff commenced this suit by attaching the defendant's interest in the growth and increase of certain joint stock put on the farm by the plaintiff, and also the defendant's half of a quantity of hay, potatoes and straw, which he had raised on the farm leased to him by the plaintiff.

After the agreement to submit to arbitration, by mutual agreement between the parties the hay, straw and potatoes on the place were sold to one Moulton, and he was to pay such price for them as should be determined by the arbitrators. Before the hearing of the arbitrators, the plaintiff sold the old stock on the place and took the avails of the sale to himself.

Before the arbitration the plaintiff and defendant agreed to divide the young stock on the place, the plaintiff taking three head, and the defendant the same number. The three taken by the defendant at the appraisal amounted to $6.50 more than the three taken by the

plaintiff, and the defendant paid to the plaintiff $3.25, one-half the difference.

At the hearing before the arbitrators both parties presented their respective accounts and claims against the other for adjustment, and the plaintiff presented a list of credits he had made to the defendant. In this list of credits the plaintiff had credited the defendant for the hay, straw and potatoes sold to Moulton, for the defendant's share of the growth or increase on the old stock, and for the defendant's share of the young stock, for which he had procured the note of a responsible man to be given to the officer.

The court found that these credits by the plaintiff to the defendant were presented by the plaintiff in such form, that the arbitrators supposed, and had a right to suppose, that they were to be adjusted by them as a part of the accounts between the parties. But in the closing argument before the arbitrators, the plaintiff's counsel claimed that the arbitrators should find and state the accounts of the parties, at the commencement of the suit, as the costs of the proceedings would depend upon how the balance stood at that time.

The arbitrators testified that they ascertained that the balance was in favor of the defendant at the time of the commencement of the suit, and therefore supposed it unimportant to award how the accounts stood at that time, and made their award generally, allowing to the defendant said items of hay, straw and potatoes, growth of old stock, and half of appraisal of young stock, as brought in by the plaintiff.

Upon these facts the court held that said award was valid, and rendered judgment for the defendant,—to which the plaintiff excepted.

——— *Burbank*, for the plaintiff, maintained that the arbitrators exceeded their authority in arbitrating upon matters that had been settled by the parties, and cited *Culver* v. *Ashley*, 17 Pick. 98; Caldwell on Arbitration, 232, 246; and erred in not specifying the balance due at the time the suit was commenced as requested: 10 Vt. 512; 4 Pick. 178 and 192, note; 27 Vt. 304.

J. Ross and *A. J. Willard*, for the defendant.

An award is of the same nature and binding force as a judgment, and equally conclusive upon the parties both as to the law and facts

passed upon, the only difference being that the parties here have voluntarily constituted the forum in which to try the case, instead of resorting to the forum provided by law; and all reasonable presumption is to be made in favor of the award. *Emerson* v. *Udall*, 8 Vt. 357; 13 Vt. 477; *Sheperd* v. *Briggs*, 28 Vt. 81; *Cutting* v. *Stone*, 23 Vt. 571; *Cutting* v. *Carter*, 29 Vt. 72; *Ennos* v. *Pratt*, 26 Vt. 631; *Briggs* v. *Brewster*, 23 Vt. 100; *Vanderwerker* v. *Vt. Cen. R. R. Co.*, 27 Vt. 130; *Kendrick* v. *Tarbell*, 26 Vt. 416.

The plaintiff himself having given the credits before the arbitrators, is forever estopped from denying the justness of the credits, or the right and power of the arbitrators to consider and adjust them. *Hicks et al.* v. *Cram et al.*, 17 Vt. 449; *Page* v. *Foster*, 7 N. H. 392; *White* v. *Langdon*, 30 Vt. 599; *Strong* v. *Ellsworth*, 26 Vt. 366; *Preston* v. *Mann*, 25 Conn. 118; *Taylor* v. *Ely*, 25 Conn. 250.

The arbitrators having found the balance against the plaintiff at the commencement of the suit, judged correctly that there was no need of finding the balance as requested by the plaintiff's counsel, and merged it all in a general balance. An award may be good in part and bad in part. *Rixford et al.* v. *Nye et al.*, 20 Vt. 132; 2 Parsons on Con., p. 210.

ALDIS, J. Under the plea as traversed the only question was, did the arbitrators award upon matters not submitted to them.

I. The submission was agreed upon after the suit had been brought, and it included not only the suit, but "all matters of difference between the parties." Hence the arbitrators were not bound by the balance between the parties as it stood when the suit was brought. They had a right to regard it as the accounts appeared at the date of the submission. The balance due when the suit was brought might affect the award as to the costs of the suit, if that balance had been in favor of the plaintiff. But the balance was found against the plaintiff, both at the time the suit was brought and at the time of trial—hence the costs of both suit and award would be against him; and in that view the arbitrators very properly deemed it unimportant to specify the balance due when the suit was brought.

II. The items which the parties settled between themselves after they entered into the agreement to arbitrate, and before the trial,

were not, perhaps, strictly matters of difference between them. But it was the plaintiff who brought them into the accounting before the arbitrators; and he presented them as credits due to the defendant. The defendant made no objection. The arbitrators supposed, and had a right to suppose, they were a part of the accounts which were to be adjusted by them.

If the parties to a submission in writing do, upon the trial before the arbitrators, submit *by mutual consent* to the arbitrators matters not included in the written submission, and the arbitrators acting under such mutual consent of the parties, do try the matters so verbally submitted and make their award,—neither party after publication of the award can object that the award exceeded the submission.

It is urged that here the plaintiff's counsel in his closing argument claimed that the arbitrators should find and state the accounts of the parties at the commencement of the suit, as the costs would depend upon how the balance stood at that time. This was not withdrawing the credits he had presented, or objecting to their being tried by the arbitrators. It was merely insisting that that aspect of the case should be regarded which might in one event give the plaintiff his costs. If the plaintiff, after presenting these items for adjustment, wished to withdraw them from the consideration of the arbitrators, he should have done so in a direct and unequivocal manner; so that the arbitrators would have as distinctly understood that the consent was withdrawn, as that it had been given.

Judgment affirmed.

HEZEKIAH S. CARPENTER, *Ap't*, *v.* EUNICE SNELL'S ESTATE, L. M. M. GRAY, *Administrator*.

Receiptor. Attachment.

There is no duty cast upon the receiptor of property attached to return it, and no cause of action arises against him on his receipt, until a demand is made for the property, which must be within the life of the execution.

Carpenter v. Estate of Snell.

Where no demand is made upon the receiptor in his lifetime, it must be made upon his personal representative before the cause of action can be considered as perfected against his estate.

An application to the administrator to consent to an opening of the commission so that a claim upon a receipt for property attached, made by the intestate, could be presented, is not equivalent to a demand of the property.

APPEAL from the decision of commissioners disallowing a claim presented by the plaintiff. The plaintiff declared in special assumpsit. Plea, the general issue. Trial by the court, June Term, 1864, POLAND, Ch. J., presiding.

Upon the facts as set forth in the opinion of the court, the county court rendered judgment for the defendant,—to which the plaintiff excepted.

G. C. & G. W. Cahoon, for the plaintiff.

Peck & Colby, for the defendant.

KELLOGG, J. This is an appeal from the disallowance of a claim by commissioners, and the plaintiff's declaration is in special assumpsit on a receipt given to him by Eunice Snell, the intestate, for property which he had attached as an officer in a suit between other parties. The property which was attached was duly charged in execution, so far as it was necessary to fix the liability of the officer to the creditor for it, but this is a suit between the officer and receiptor, and not in favor of the creditor against the officer. Before the recovery of judgment in the suit on which the attachment was made, the receiptor died, and administration had been taken out on her estate. There was no proof that any demand for the property was made upon her in her lifetime, or upon her administrator after her decease; and, upon this ground, the county court decided that this action could not be maintained.

The obligation or duty of the intestate, as expressed in the receipt which she executed to the plaintiff, was to return the attached property "on demand." To preserve the lien of the attachment on the property, it is necessary that execution should be issued and delivered to an officer for levy within thirty days from the time when the creditor first becomes entitled by law to take out execution on the judgment; and, to charge a receiptor on his receipt, it is necessary that the property should be demanded of him within the life of that execution by the delivery of which to the officer the creditor's lien is

kept good. *Bliss* v. *Stevens*, 4 Vt. 88. There is no duty cast upon the receiptor to return the property, and no cause of action arises against him on his receipt, until a demand is made for the property. In *Page* v. *Thrall*, 11 Vt. 230, it was held that the officer's right of action on his receipt accrues on his making a demand, and that the statute of limitations begins to run from that time. The receiptor is the bailee of the property and holds it for the officer, upon the condition that the liability of the officer for it to the attaching creditor becomes fixed by duly charging the property in execution. In the contemplation of the parties, as shown by the contract of bailment, the property is to remain in the possession of the receiptor until it is called for by the officer or otherwise duly demanded, and a demand on the receiptor for it is made essential to perfect a cause of action upon the receipt, as well by the very nature of the bailment as by the express terms of the contract. There was no breach of the contract of bailment during the life of the intestate, for she was not called on in her lifetime to return the property, and it is not claimed that she had used or disposed of it, or that she had placed herself in such a position that she would not have been able to comply with the terms of the contract if a demand had been made upon her. There is no ground upon which it can be assumed that she would have refused to return the property if a demand had been made. There was, consequently, no perfected cause of action against her on the receipt in her lifetime. If a demand was necessary to complete the cause of action in her lifetime, there is the same necessity for a demand of her personal representative before the cause of action can be considered as perfected against her estate. It is to be presumed that this property was in her possession, or under her control after its bailment to her by the plaintiff, and that the same custody and control of it passed to her administrator when appointed; and a demand for the property could not be dispensed with as an element to a perfected cause of action, unless in a case where there was no such personal representative at the time when the demand for the property ought to have been made. The application made by the plaintiff to the intestate's administrator, to consent to the opening of the commission, so that the claim which he now makes could be presented to the commissioners for allowance against her estate, cannot

be regarded as equivalent to a demand for the property, even if it appeared to have been made in seasonable time, because the administrator would have no right to understand, from such an application, that he was called on to look up and deliver the property on the receipt. The application proceeded on the ground that the cause of action was complete at that time, and the plaintiff obtained from the probate court the very same privilege and liberty for which he made this application to the administrator. He was placed by the probate court in precisely the same position in which he would have been if the administrator had consented to his application; and the refusal of the administrator to accede to his application did not operate in any degree to his injury. If the administrator had been called on for the property, he might have looked for it and had it forthcoming in satisfaction of the terms of the receipt.

Judgment of the county court for the defendant affirmed.

HOLLAND BONETT, *by his Father and Natural Guardian* CHATMAN D. BONETT, *v.* JOTHAM E. STOWELL.

Evidence. Husband and Wife.

The plaintiff, being an infant, commenced and prosecuted his action by his father as his natural guardian, who was not a party to the subject matter of the litigation. *Held*, that the guardian's wife was a competent witness.

TRESPASS for an assault and battery, prosecuted by the plaintiff's father and natural guardian, C. D. Bonett. Plea, the general issue. Trial by jury, December Term, 1863, POLAND, Ch. J., presiding.

On the trial the plaintiff offered as a witness in his half, the wife of said C. D. Bonett. The defendant objected that she was not a competent witness for the plaintiff, but the court overruled the objection, and permitted her to testify for the plaintiff,—to which decision the defendant excepted. Verdict for the plaintiff.

G. C. & G. W. Cahoon for the defendant.

The guardian, Bonett, is a party to the suit, made so by law. He sustains the relation of natural guardian, is entitled to his son's earn

ings, and therefore directly interested in the event of the suit, and therefore stands in a different relation from what a stranger or *prochein ami* would or could. He alone is liable for the costs and not the infant. *Finley* v. *Jowle*, 13 East, 6 and note; Reeve's Domestic Relations, p. 265.

In the case of *Cram, Adm'r*, v. *Cram*, the court excluded the evidence of the administrator's wife, although he testified he had no interest in the suit. The same rule should hold good where a suit is prosecuted by a guardian. *Cram, Adm'r*, v. *Cram*, 33 Vt. 15; *Manchester* v. *Manchester*, 24 Vt. 649; *Smith* v. *Potter*, 27 Vt. 304; *Seargent v. Seward*, 31 Vt. 509.

Bartlett & Thacher, for the plaintiff.

KELLOGG, J. The plaintiff, being an infant, commenced and prosecuted this suit by his father as his natural guardian. On trial the wife of this guardian was offered, and, against the objection of the defendant, was allowed to testify, as a witness in support of the action. The sole question in the case is, was she a competent witness for the plaintiff? If her husband's relation to the suit was such as to make him a *party* to it, she was incompetent. *Cram, Adm'r*, v. *Cram*, 33 Vt. 15.

Judge REEVE, in his treatise on Domestic Relations, p. 265, says that the better opinion is that no execution for costs can issue against an infant, for costs came in place of the common law amercement *pro falso clamore*, and the infant could not be subject to an amercement, and, of course, could not be liable for its substitute. *Finley* v. *Jowle*, 13 East, 6, recognizes the rule that an infant plaintiff is not liable to costs, though in that case it was held that the infant, having concealed his infancy and prosecuted the suit without a *prochein ami* or guardian, was not entitled, when taken in execution, to be relieved or discharged out of custody. It has always been the rule that a recovery for costs, where an infant plaintiff fails in the action, is against the guardian or *prochein ami* who promotes or prosecutes the suit, and not against the infant. In such a case, the guardian or *prochein ami* is considered to undertake the conduct of the action at his own personal risk in respect to costs, and he becomes liable for the costs accordingly; though, if his conduct was proper in bringing and conducting the suit, the infant's property would ultimately be

made liable to refund the costs. The appointment of a guardian *ad litem* or *prochein ami* may be revoked by the court, on cause shown, on the application either of the infant or the adverse party. On the infant coming of age, the authority of the guardian or *prochein ami* ceases, and the infant may remove him and appoint an attorney to continue the action. 2 Chitty's Archbold's Pr., (9th edit.,) 1167, *et seq.*

In this case the guardian was not a party to the cause of action which was in litigation, but was merely the manager and conductor of the suit for the infant, who was the real party, and for whose sole benefit a recovery for damages would enure. In *Brown* v. *Hull*, 16 Vt. 673, it was held that when an infant commences an action in the name of his next friend, the person so named as next friend is not to be regarded for any purpose as a party to the suit. The rule must be the same in the case of a guardian as in case of a *prochein ami;* and, as the guardian in this case was not a party to the subject matter of the litigation, we think that he was not a party to the suit in such a sense as would exclude his wife from testifying as a witness on the trial.

Judgment of the county court for the plaintiff affirmed.

HARLAN KEYES *v.* SAMUEL RINES, S. R. WILLEY *Trustee*, AND LOUISA RINES, *Claimant.*

Homestead. Husband and Wife. Trustee Process.

Where the sum of $500. has been actually invested in land as a homestead, and changed into money, or a right of action by process of law, *in invitum*, and then kept as a separate homestead fund, not commingled with other moneys, and no intent shown to apply it to other uses, it is held to be exempt from attachment. And this is held to apply to a debtor coming to this state and bringing the fund with him from another state whose laws protect it to the same extent as our own.

The defendant's wife signed a deed of their homestead, sold under process of law in New Hampshire, upon condition of the payment of the proceeds to her, to be kept by her as a separate fund for a future investment in a homestead, free from

all interference of her husband. *Held*, that she thereby acquired title to the money and held it free from attachment on her husband's debts.

Subsequently her son-in-law purchased a farm for $1700., and it was agreed that one-half of it should be deeded to her, and for half the purchase money she was to pay in the $400. received for the homestead, and her two sons were to make up the balance, but living South, were prevented from completing the payment by the breaking out of the rebellion; but she paid the $400. to her son-in-law, and with her family moved on to the place, and he, as a temporary arrangement and waiting the completion of the bargain, gave her his note for the amount. *Held*, that this money may be regarded as already by agreement invested in the land, and the note was rather in the nature of a receipt than a promise to pay, therefore not liable to attachment on the defendant's debts. ALDIS, J., dissenting.

TRUSTEE PROCESS. The facts found by the commissioner are fully set forth in the opinion of the court.

Upon the commissioner's report, the court, December Term, 1863, POLAND, Ch. J., presiding, decided that the trustee was not chargeable, and rendered judgment that he be discharged with costs,—to which the plaintiff excepted.

G. C. & G. W. Cahoon, for the plaintiff, cited Law. Reg. Oct. 1862, p. 706, note; *Atkinson* v. *Atkinson*, 37 N. H. 434; *Howe* v. *Tufts*, 39 N. H. 478; *Davis and wife* v. *Andrews*, 30 Vt. 678; *Gunnison* v. *Twitchel*, 38 N. H. 62; *Bennet* v. *Cutler et al.*, 44 N. H. 69; *Howe* v. *Adams*, 28 Vt. 544; *Jewett* v. *Brock et al.*, 32 Vt. 65; Law Reg. Oct. 1862, p. 710; *Stebbins v. Peeler and Trustee*, 29 Vt. 290; *Scott* v. *Brigham and Trustee*, 27 Vt. 56; *Edson* v. *Trask and Trustee*, 22 Vt. 18; *Gay and wife* v. *Estate of Rogers*, 18 Vt. 342; *Hill and wife* v. *Royce*, 17 Vt. 192; *Rawlins and wife* v. *Rounds*, 27 Vt. 18.

Cree & Davis, for trustee and claimant, cited *White* v. *Hildreth*, 32 Vt. 265; *Webster* v. *Hildreths*, 33 Vt. 457; *Richardson* v. *Merrill's Estate*, 32 Vt. 27, and cases therein cited; *Hoyt* v. *Swift et al.*, 13 Vt. 129; *Kettle* v. *Harvey and Trustee*, 21 Vt. 301.

ALDIS, J. The plaintiff seeks to hold by trustee process the sum of $400., as the property of Samuel Rines, the principal defendant. The trustee has given his note for the $400. to Louisa Rines, the wife of Samuel Rines. The note being payable to Mrs. Rines, is *prima facie* her property, and of course not liable for her husband's debts.

To rebut this presumption, and to show that it is really the money of Mr. Rines, the plaintiff shows these facts. Mr. and Mrs. Rines

owned a homestead in New Hampshire. Mr. Rines being in debt, and the house and lot he owned being worth more than the $500. exempt as homestead, and being incapable of division, his creditors, pursuant to a statute of New Hampshire, sold the property at auction. By the New Hampshire law, the proceeds of the sale of the homestead part could not be paid to the husband without the consent of the wife, but (such consent wanting) should be deposited in a savings bank, where for one year it could remain free from attachment, and from which it could only be drawn upon the joint order of the husband and wife. If paid to the husband with the consent of the wife, or if paid to the wife by consent of the husband, the law is silent as to whether it would be exempt from his debts; but the spirit of the law would seem clearly to imply, that the proceeds of the fund while kept by both husband and wife as a homestead fund—separate from other moneys and not applied to other uses—would be free from attachment upon the husband's debts.

We think the fair meaning of the N. H. statute is, that the homestead when changed, by process of law *in invitum* as to its owners, into money, remains in its new form exempt from attachment so long as its owners keep it as such a separate fund, and do no act indicating its diversion and abandonment from such special use to other purposes. In the case at bar the wife refused to join her husband in a deed to the purchaser, unless the proceeds should be paid to her. But upon the assurance that she could hold the money as safely as she could the homestead, and upon payment of the proceeds to her, she consented to join in the deed. The $400. was paid to her, by the consent of the husband, and upon the condition and terms above indicated; and she has ever since kept the money in her own hands, free from all interference of her husband;—a separate fund, with the intent to invest it in a homestead. When her son-in-law, the trustee, purchased a farm for $1700., it was agreed that one-half of it should be deeded to Mrs. Rines, and for half of the purchase money ($850.) Mrs. Rives was to pay in the $400. she so held, and her two sons should make up the balance to the trustee. These two sons were in the state of Georgia, and by the breaking out of the rebellion have been prevented (as is said in the disclosure) from re-

mitting the $450. to their mother. But she paid the $400. to the trustee; and he, as a temporary arrangement and waiting the completion of the bargain, gave her his note for the amount. And upon this arrangement she, and her husband and family, and her son-in-law, the trustee, moved on to the farm so bought, and have ever since resided there.

I. Let us consider the money merely as proceeds of the homestead, changed by process of law from land into money, kept by the wife as a homestead fund by the consent of the husband—kept separate by her, and with the abiding intent to appropriate it solely for a homestead.

A clear distinction has been made in the decisions in this state between the proceeds of personal property exempt from attachment when such property has been voluntarily sold by the debtor, and when taken from him by proceedings against his will and changed into money.

In the first case, the money or proceeds are held not to be exempt from his debts. The rule in such case is as expressed by Judge ROYCE in *Edson* v. *Trask and Trustee*, 22 Vt. 18, "The statutory exemptions of property in favor of debtors are uniformly limited to specific chattels, and do not extend to debts or pecuniary claims due the debtor." That was the case of a cook-stove exempt while in in the debtor's hands, but the proceeds of it, or the debt for it, not exempt.

So "the tools of one's trade," and a last cow, when sold, have been held in their new form of debts due the debtor, as not exempt. *Scott* v. *Brigham*, 27 Vt. 561.

But where the property has not been voluntarily sold by the debtor, but changed in its form by process of law and against his will, then the proceeds are still held to be protected by the statute. Otherwise the debtor would be deprived of all benefit of the statutory exemption. This doctrine is fully established in *Stebbins* v. *Peeler and Trustee*, 29 Vt. 289. Ch. J. REDFIELD says, "Where this property is converted into a mere right of action, by a proceeding wholly *in invitum*, such right of action and the money collected are also exempt from attachment, the same as the property itself." This principle is in harmony with the recent legislation of our state upon the home-

stead law—our statute expressly providing for the protection of the proceeds of a homestead sold by process of law and for their investment under the order of court.

The proceeds of the homestead here in question were protected for the benefit of the wife and children while they remained in New Hampshire. They were kept by the wife, as a homestead fund—the identity of the fund preserved as well as the intent to apply it to the specific use. By removal to Vermont they came to a state where the same protection was extended to property so situated. Is there any reason why such a fund of the poor debtor should not be so sequestered and secured to its humane object because the debtor comes from a sister state to reside among us, and brings the fund with him from a state whose laws protect it to the same extent as our own? We think not. Of course neither a resident nor one who comes from abroad can of their own will set apart $500. and say, "this is a homestead fund, and therefore exempt." But where that sum has been actually invested in land as a homestead, and changed into money or a right of action by process of law *in invitum*, and then kept separate—not commingled with other moneys, and no intent shown to apply it to other uses, we think the reason and spirit of the law require it to be held sacred to its original use and to be exempt from attachment.

II. In this case too we think the transaction, as disclosed in the commissioner's report, might well be held as establishing a title in the wife to the money.

She had an interest in it by law, and refused to join in the deed with the husband unless the avails were to be hers. Her intent was that it should be hers and not her husband's—so that neither he nor his creditors could apply it to his debts. He consented. Her execution of the deed was a good consideration at least in part. It was a relinquishment of her interest in the land. If in part also it is to be deemed as a voluntary gift by the husband, this too may be justly upheld. He gives only what he has a right to give, viz: property exempt from his debts. His creditors can not call that a fraud which can do them no injury. Their rights are not impaired by his giving away property not liable to attachment. No intent to defraud is pretended to have existed. The wife therefore had by gift all her

husband's interest in the fund, and there was nothing left in him for his creditors to attach.

It is to be observed in this connection that the money has always been in her hands—claimed by her as her own and not interfered with by her husband.

III. A third ground for discharging the trustee was suggested in argument, and is deemed tenable by a majority of the court. It is that the contract between Mrs. Rines and her son-in-law may be fairly construed so that the money may be regarded as already by agreement invested in the land;—the bargain so far consummated that she has an equitable right to demand a conveyance of the land upon payment of the $450. still due, and the bargain remaining open for that to be done. The trustee says the note he gave her was only for a temporary purpose, and to await the completion of the contract. In this view the note as between the parties would rather be in the nature of a receipt acknowledging the amount paid, than a promise to pay. I am not able to say that this view of the case is satisfactory to my mind.

Judgment affirmed.

CHARLES C. NEWELL, *Administrator of* AMASA W. NEWELL, *v.* CHARLES T. A. HUMPHREY.

Account. Partnership. Pleading.

The action of account may be maintained at common law by the representative of a deceased partner against the surviving member of a co-partnership; nor is it interdicted by our statutes on the subject, they having been passed not for the purpose of limiting the action to the cases enumerated, but to extend it to certain cases where it did not lie at common law.

The plaintiff's intestate and defendant entered into a joint enterprise for buying stock on commission, under an agreement that the intestate's commissions should be paid to a firm, of which the defendant was a member, in liquidation of a debt that the intestate owed the firm. This action was brought to recover the intestate's commissions. After his death said firm presented their claim for said debt to the commissioners and the same was allowed, the firm giving no credit for the intestate's commissions in the hands of the defendant. *Held*, that this

was a waiver of the defendant's right to insist on said agreement as a defence to this action.

The plaintiff is entitled to recover for commissions on purchases incomplete at the intestate's death, but carried out subsequently by the defendant, in respect to which the partners in said enterprise had spent time and incurred expense prior to the intestate's death.

TRUSTEE PROCESS. The auditor reported that Amasa W. Newell, the plaintiff's intestate, and the defendant, in June, 1862, entered into a joint enterprise of buying sheep and lambs and cattle on commission for one Wm. F. Ruggles, of Sutton, which was to continue during the season of that business. They agreed to buy jointly and divide the commissions equally.

The intestate died on the 20th day of September, 1862, previous to which the defendant and intestate, together or separately, had canvassed certain territory agreed upon, and had ascertained of whom purchases could be made, had made purchases and delivered to Ruggles, had made purchases without delivery, and in some cases had merely ascertained the probable number of purchases which could be made, when the parties were ready to sell, without completing them. After the death of the intestate, the defendant, assisted by Oliver W. Newell, a brother of the intestate and minor son of the plaintiff, proceeded to collect and deliver sheep to Ruggles, in the same manner as in the life of the intestate, until the 17th day of October following.

The plaintiff charged the defendant for one-half of the commissions of all purchases and deliveries made up to October 17th, 1862.

The auditor found that the business in which the parties engaged, continued that season until October 17th, 1862; that what was done by the defendant and Oliver in the delivery to Ruggles, after the intestate's death, up to October 17th, 1862, was the legitimate and regular business of the season, for which the enterprise of the parties was undertaken, and that, in the purchases subsequently completed, negotiations had been made by the defendant or intestate previous to Newell's death.

The defendant made no difference between purchases and deliveries after the intestate's death and those made before in the manner of keeping his accounts and making deliveries to Ruggles,

After the business was through, the defendant, without the knowledge of the plaintiff settled with Oliver and paid him what was satisfactory to Oliver, and what was a reasonable compensation for his services.

It appeared that the intestate at the time of forming the partnership was indebted to the firm of Humphrey & Smith, of which the defendant was a member, to the amount of some two hundred dollars; that the defendant and intestate agreed to buy sheep and cattle together, the intestate's commissions to be applied on the Humphrey & Smith debt, and in consideration of said application, Humphrey & Smith agreed to admit him into partnership with them when said debt was paid. This fact appeared from the testimony of Humphrey & Smith, and from an exhibit of their account, but previous to being sworn Smith transferred his interest in the claim of Humphrey & Smith against the intestate to the defendant.

No settlement or application of commissions was made by the intestate and the defendant. The commissions remained in the hands of the defendant at the time of the intestate's decease.

The auditor allowed on the basis of the plaintiff's claim as follows:

Whole amount of commissions to October 17th, 1862,		$284.00.
Pro rata allowance for license,	$1.25.	
Defendant's account for expenses,	130.00.	
" " for time,	20.00.	
Whole amount of defendant's allowance,		$151.25.
Balance to be divided,		$132.75.

One-half of which, with interest, and the balance of the intestate's undisputed account amounted to $102.97.

Upon the defendant's ground of accounting the auditor found as follows:

Whole amount of commission,	$146.83.
Defendant's account,	65.12.
Balance to be divided,	$81.21.

One-half of which, with interest and the intestate's account amounted to $75.78.

Upon the report of the auditor the court, at the December Term, 1863, POLAND, Ch. J., presiding, rendered judgment for the plaintiff for the larger sum reported,—to which the defendant excepted.

G. C. & G. W. Cahoon, for the defendant.

I. By the death of one of the partners the partnership is *ipso facto* dissolved. Collier on Part. 59, 113; Watson on Part., p. 263; 3 Baylis' Dig. index, p. 369, § 4; 15 John. 15; Story on Part., ch. 5, § 1, pp. 219, 220, 3d ed.; *Gillipine* v. *Hamilton*, 3 Madd. 254; *Scholefield* v. *Taylor*, 7 Peters, 586.

The partnership was dissolved by the death of Newell, and the defendant is not bound to account for purchases made subsequently, and "in taking the partnership accounts, it is mainly to be considered what was the value of the joint property, and what the amount of the joint debts at the time of the dissolution." Collier on Part. p. 171.

II. Humphrey and Smith were competent witnesses.

III. We insist that the offset was a legal one, made so by the terms of their partnership agreement, and therefore should have been offset against the claim of the intestate. Collier on Part. p. 447, and cases cited; *Meader* v. *Scott*, 4 Vt. 26; *Meader* v. *Leslie*, 2 Vt. 569; *Ferris et al.* v. *Burton*, 1 Vt. 439; *Foot* v. *Ketchum et al.*, 15 Vt. 258; *Downer* v. *Dana et al.*, 17 Vt. 518.

Bartlett & Thacher, for the plaintiff.

PECK, J. It is objected that the action of account cannot be maintained by the representative of a deceased partner against a surviving member of the co-partnership. It is urged by the defendant's counsel, that as the statute of 1852 on the subject of actions of account between partners does not mention executors and administrators, such legal representative cannot maintain such action. Our statutes on the subject of the action of account were not passed for the purpose of limiting the action to the cases enumerated, but to extend the action in certain cases where it did not lie at common law. The action of account between partners exists at common law. The object of the act of 1852 was to enable a partner to sustain this action where there were more than two partners, having separate and distinct interests, which could not be done at common law by reason of the inability of a court of law to render several and distinct judg-

ments in one action. The action lies in this case without the aid of that statute, and survives to the administrator. There is another reason why this objection cannot avail the defendant. He has submitted to a judgment to account, and had the case tried on the merits before the auditor, and cannot now raise this objection. Nor does it appear that this question was raised in the county court. The defendant cannot for the first time raise this technical objection in this court under a general exception to the decision of the county court rendering judgment for the plaintiff on the report.

The defendant claims that upon the facts reported the balance found due the intestate cannot be recovered; that it should be applied on the debt the intestate owed Humphrey & Smith, (of which firm the defendant was a member). The auditor finds an agreement for such application, and that that debt is still unpaid. It is insisted by the plaintiff's counsel, that as that contract was executory, and no application had been made on the Humphrey & Smith demand at the intestate's death, it cannot be set up to defeat the action brought by the administrator. But as the defendant has received the plaintiff's share of the profits, the contract is so far executed that the administrator could not collect the fund from him in violation of that agreement, if nothing further appeared. But it is conceded by counsel and treated as a fact in the case, that Humphrey & Smith presented and had allowed the whole of their claim against the intestate before the commissioners on the intestate's estate. It is true that the administrator did not present this claim in offset before the commissioners. It does not appear that he knew of any agreement to make such application. No plea in offset is necessary in such case. The debts are not mutual debts between the same parties. The right to make the application rests on the agreement; and if the defendant wished to avail himself of the agreement, he ought to have presented it and had the application made before the commissioners. The recovery of the whole claim of Humphrey & Smith before the commissioners, and the omission to give credit for the fund in the hands of Humphrey, is a waiver of the defendant's right to insist on that agreement as a defence to this action. This view of the case renders it unnecessary to decide the question which has been discussed as to the competency of Humphrey & Smith

to prove the agreement, the other party to the agreement being dead.

The remaining question is, which of the sums reported by the auditor is the plaintiff entitled to recover? It appears that the intestate died September 20th, before the close of the business season during which the copartnership by its terms was to continue. The report shows that previous to the intestate's death the partners had made purchases and deliveries, and had incurred expense and spent time in relation to incomplete purchases which they had in contemplation, and which were carried out by the defendant after the intestate's death. The auditor finds that what was done after the intestate's death, in delivering to Ruggles, was the legitimate business of the season for which the enterprise of the parties was undertaken, and that in the purchases subsequently completed, negotiations had been made by the defendant or the intestate previous to the intestate's death. The defendant claims that he should not be charged with any part of the commissions on deliveries under purchases that had not been completed by payment of money previous to the death of Newell. On this basis the auditor finds the balance due the plaintiff $75.28. On the basis of charging the defendant one-half the commissions he received on those incomplete transactions, and allowing him for his time and expenses in perfecting them, and in delivering to Ruggles after the death of Newell, the auditor finds the balance due the plaintiff $102.97. The counsel of the defendant is right in claiming that the partnership was terminated by the death of Newell. His death however did not operate as a forfeiture of his existing rights. The commissions on these purchases were partly earned before Newell's death, and his representative is therefore entitled to some portion of what the surviving partner ultimately received. The mode adopted by the auditor was to treat the commissions on these inchoate transactions as partnership assets, and allow the defendant for his time and expenses in completing them. This is equitable and just, and we see no reason why it is not legal.

The judgment of the county court for the larger sum is affirmed.

SARAH G. PUTNAM AND OTHERS, *Appellants*, v. THE AMERICAN BIBLE SOCIETY AND OTHERS, *Appellees*.

Wills.

Construction given to the words "my other legatees," in a will.

THIS was an appeal from a decree of the probate court for the district of Caledonia, distributing the "residue" of Mrs. Lydia C. Shedd's estate, under her will, to certain legatees. The only question made in the county court was whether the residue should be decreed to the six following societies, viz: American Board of Commissioners for Foreign Missions, the American Tract Society established at Boston, the American Bible, the American Home Missionary, the American Colonization, and the American Education Societies, or to the four first named societies exclusively. It was claimed by the executors and by said four societies first named, that said residue, by the terms of the will, was given exclusively to said four societies.

The court, June Term, 1864, POLAND, Ch. J., presiding, *pro forma* ruled, that the decree of the probate court ordering the residue of the said estate to be distributed to the said six societies in the proportions named in the decree, be affirmed and so certified to the probate court. To this ruling, the said four societies excepted.

The provisions of the will are sufficiently set forth in the opinion of the court.

Child & Towers and *Peck & Colby*, for the American Board for Foreign Missions, the American Tract, the American Bible, and the American Home Missionary Societies.

———, for the American Colonization and the American Education Societies.

ALDIS, J. The case before us arises upon the construction of the will of Mrs. Lydia C. Shedd.

Dr. Josiah Shedd of Peacham by his will, after making many bequests, left "the residue of his estate," amounting to about $29,000. to Mrs. Shedd (the lady whose will is now before us) "in trust for our indigent and unfortunate relatives, or for the promotion of charitable objects to be by her selected, to be distributed in sums and at

times according to her best judgment and discretion." Mrs. Shedd had in her own right an estate of about $15,000.

The testatrix made a will dated January 14th, 1854, a codicil dated March 19th, 1859, and a second codicil dated September 30th, 1861. Among other bequests she gave

The American Board of Commissioners for Foreign Missions,	$3,000.
The American Tract Society,	4,000.
The American Bible Society,	4,000.
The American Home Mission Society,	3,000.

and provided that the foregoing legacies be paid from the proceeds of the property "assigned to me as the residuary legatee under the will of my husband," &c.

She then proceeds to make bequests to her relatives. Then she gives—

To the American Bible Society the further sum of			$1,000.
To the American Tract Society	"	"	1,000.
To the Am. Board of Com'rs for F. M.	"	"	1,000.
To the Am. Home Missionary Society,	"	"	1,000.

There is then this provision:—"Should my estate be insufficient to pay all the foregoing legacies, the difference shall be deducted from the legacies made to said societies, including the American Board of Commissioners for Foreign Missions, in proportion to the amount bequeathed to each; and provided also that the residue of my estate, including that received by me as residuary legatee as above named and all other shall be added to and apportioned upon *all* the above named legacies in proportion to the amounts of said legacies and *pro rata*."

Thus by this first will the residue of her estate not given away by special bequests was to be divided among all her legatees in proportion to the amounts of their legacies;—no distinction being made in the distribution of the residue between her relatives and the charitable societies.

By the first codicil she reduced the legacy to the Colonization Society from $3,000. to $2,000.;—gave about $8,000. more to her relatives, and then bequeaths "the residue of my estate to the four following societies, viz:

The American Board of Commissioners for Foreign Missions.

The American Home Missionary Society.

The American Bible Society.

The American Tract Society.

The effect of this codicil was to take $8,000. from the residue not before specially bequeathed and give it to her relatives, and then to divide the whole of the residue among the four charitable societies above named,—deducting also $1,000. from the bequest to the Colonization Society.

By the second codicil she first made the following provision, and it is upon the construction of this clause in the will that the controversy has arisen:—

"It is my will and desire to constitute and make the following societies and associations my residuary legatees, (to wit,) the American Board of Commissioners for Foreign Missions; the American Tract Society, established at Boston; the American Bible Society; the American Home Missionary Society; the American Colonization Society; and the American Education Society; and said societies are hereby constituted my only residuary legatees, under the following restrictions and reservations. I give and bequeath to the said American Colonization Society, fifteen hundred dollars, instead of the sums mentioned in my said will and codicil; and I give and bequeath to the said American Education Society, the sum of one thousand dollars; and if there shall not be an amount sufficient of my property to pay said societies the amount specified in my said will and codicils, said residue shall be divided among them in proportion to the amount specified to each of them; and if there shall be more than enough to pay the whole amount so specified, then the same shall be divided among my other legatees, in proportion to their several bequests, or otherwise, as I may hereafter direct; meaning what shall remain after paying other special bequests and legacies, mentioned in my said will and codicil, or whatever other legacies I shall hereafter make; and also what shall be necessary to pay the expenses of settling my estate, and funeral charges; and I further direct that the several sums heretofore paid said societies, and charged on my book, shall be taken and considered as so much payment of said aforementioned legacies."

She then proceeds to make various alterations in the bequests to her relatives, in order that the gifts she had made them since making

her former will and the bequests as altered might make the whole sums received by them just and equal according to her intentions. It is not important to state them. The legacies in the first will of $1,000. each to the four societies she "revokes in full," "having adjusted my bequests in relation to those societies satisfactorily in this codicil."

By the whole will as thus finally revised her bequests stand thus:—

1st. There are special bequests to her relatives and friends, and to the Vermont Domestic Missionary Society, the Caledonia County Grammar School, and the Congregational Church in Peacham.

2d. There are special bequests to six charitable societies as follows:—

To the American Board of Comm'rs for Foreign Missions,	$3,000.
" American Tract Society,	4,000.
" American Bible Society,	4,000.
" American Home Missionary Society,	3,000.

(Each of the former specific bequests to these societies being reduced by the last codicil $1,000. each.)

To the American Colonization Society,	$1,500.

(it being reduced by the last codicil from $2,000. to $1,500.) and

To the American Education Society,	$1,000.

(this bequest being a new one,—this society not appearing before in the will as a legatee.)

Such are the specific legacies.

The question arises, to whom does the residue of the estate go, after these special bequests are all paid? The residue is about $20,000. The four societies above named, viz: the Tract, Bible, Home Missionary and American Board claim that the whole residue should go to them. The Colonization and Education Societies claim that the residue should be divided among the six societies. The obscurity arises from the use of the words "my other legatees" in the clause which provides for the distribution of the residue. If we read that whole paragraph, clause by clause, it is all plain enough till we come to this—"if there shall be more than enough to pay the whole amount so specified, then the same shall be divided among my other legatees." My other legatees. Other than whom? Up to these

words the paragraph has been dealing wholly with the residuary legatees. The grammatical connection of these words, "my other legatees," with the rest of the paragraph clearly requires that they should be construed to mean, *other than my residuary legatees.* "The said societies" in the next preceding clause, all agree, refer to the six societies named as residuary legatees;—the clause provides if my property is not sufficient to pay "said societies," (meaning the six,) the amounts specified in my will, the residue shall be divided among them (the six societies) in proportion to the amounts specified to each of them; and if there shall be more than enough to pay the whole amount so specified, (that is the specific bequests to the six societies,) then the same shall be divided among my other legatees—that is my legatees *other than the six societies.* This at first blush seems the plain, grammatical and natural meaning of the clause. But upon a little consideration this first clear impression begins to be overcast with doubts. Referring back to the first clause of the paragraph she most clearly and plainly declares that she constitutes the six societies her residuary legatees. Indeed she repeats the idea with emphasis "said societies are constituted my *only* residuary legatees."

How can they be residuary legatees when they are, by the above construction we have given to the latter clause in the paragraph, wholly cut off from having any share in the residuum? A residuary legatee who does not receive any part of the residue! It is a contradiction. Thus the two clauses in their grammatical construction contradict each other.

Did Mrs. Shedd understand the meaning of the words "residuary legatee?" Most certainly. She was an intelligent and educated lady. She had been the "residuary legatee" of her husband's estate, receiving in trust $29,000. by virtue of those very words. She uses them twice in the first will according to their correct meaning. When she makes the six societies her "only residuary legatees" she would seem to have clearly intended precisely what the words mean.

It is true that she makes them her residuary legatees "under the following restrictions and reservations"—viz: that the Colonization Society shall have a special bequest of $1,500. instead of $2,000.—

the American Education Society have $1,000, which had no legacy before—the other four societies be reduced $1,000. each, and then if there be a deficiency each shall lose *pro rata*. These are restrictions. The further special bequests which follow to her relatives and friends, may perhaps be considered as reservations;—so the power reserved to deduct "whatever other legacies I may hereafter make."

If we suppose that the distribution of the whole residue to her "other legatees"—that is to her special legatees as distinguished from her residuary legatees—was what was meant by "restrictions and reservations" it makes the restriction or reservation completely absorb and nullify the previous gift. To give the words, "restriction, reservation," such a meaning, such an extent and effect, would be quite beyond their usual signification. It would not be restricting the previous grant, or reserving anything from its operation; but it would be wholly destroying it. The phrase "under the following restrictions and reservations" is fully satisfied by the provisions which do follow it, and does not aid the theory that "other legatees" means the special legatees.

The next clause in the paragraph lends aid to the idea that the residuary legatees are meant. It is—"meaning what shall remain after paying other special bequests and legacies," &c. The context shows this is put in to explain what is meant by "the residue," "the same" to be divided to the "other legatees,"—how that "residue" is made up. Now "what shall remain after paying other special bequests and legacies" means what shall remain after paying the special legatees as distinguished from the residuaries. This meaning all admit. But she could not have intended that what should remain after paying the special legatees should go to the special legatees under the name of "other legatees." That would be a most awkward form of expressing the idea;—and it would wholly cut off the special bequests to the societies. But if "other legatees" means the societies, then the defining the residue which is to go to them as "what remains after paying the special legacies" is intelligible, clear and consistent.

Other considerations tend to show that by other legatees she did not mean her special legatees as distinguished from her residuaries.

It is natural that she should intend that those who must lose by a deficiency should gain if there was a surplus.

After making her first will she gave to her nephew and neice their shares, $1,500. each,—hence in her first codicil she revokes their legacies, and they subsequently are mentioned as legatees to but comparatively a small amount. In the second codicil other legatees are added. The residuum if divided among the special legatees would increase the legacy of each one named in the will three fold. While those legatees first mentioned, some of whom appear to be near relatives, and who, having actually received their shares, appear not at all or but slightly as legatees in the codicils, would receive much less than we may reasonably suppose was intended. Other unreasonable results follow, which were pointed out in argument, such as increasing the legacy for the bell from $300 to $900, the gifts to servants three fold, &c.

The changes in the will indicate to the mind that the special legatees were not meant to be residuaries.

In the first will all the legatees—relatives, societies and all—shared the residuum *pro rata*. In the first codicil about $8,000. was taken from the residue and bequeathed to relatives, and then the residue given to the four societies.

In the second codicil it would appear that the amount taken from the residue and by the first codicil given to relatives had been by gift distributed to them when living, or by the second codicil was then bequeathed to them; so that she took nothing from their share. The special legatees still had received or would receive as much from her estate as she had at any time intended to give them. If then her will remained unchanged the residue would still go to charitable objects as in the first codicil. But if she had changed her mind and intended to give the whole residue to her relatives and special legatees, is it not very singular, or rather does it not seem inexplicable, that she should begin her second codicil by a clear and emphatic declaration that she made the six societies her residuary legatees?

The reason given for revoking the thousand dollar legacies to the four societies, viz: "having adjusted my bequests in relation to those societies satisfactorily in this codicil," seems to point to something more than a mere diminution of the gift. That does not seem to

mean—"I diminish their legacies by $1,000. each and let the remainder stand;" but rather—"I revoke the special gifts of $1,000. each, as I leave them each a share in the residue of my estate." Taken in connection with the paragraph which makes them residuaries, the reason given for the revocation of the special bequests of $1,000. each becomes plainly intelligible.

If then the special legatees as distinguished from the residuaries are not meant by the words "other legatees," do the words mean the four societies instead of the six?

It is urged that the word "other" can have no meaning unless so applied—that the naming of the Colonization and Education Societies in the forepart of the sentence supplies objects intended to be excluded by the use of the word "other"—"my other legatees" thus meaning my legatees other than the two societies above named.

But this construction encounters the same difficulty as the one which gives the residuum to the special legatees—for the whole six societies are named as residuary legatees, and how can there be a residuary legatee who does not share in the residuum?

Such an application of the word "other" is not grammatical. If we apply the rules of grammar to the sentence we perceive that two clauses intervene between that part of the sentence which speaks of the two societies and this word "other," and that in these two clauses the whole six societies are referred to as "said societies"—are grouped together as sharing *pro rata* in the loss if there is a deficiency; and then when the distribution of a surplus is supposed, there is nothing to separate any of them from the others, but *all* seem fairly to be either excluded by the word "other," or else to be all included in the phrase—"my other legatees." To jump over the intervening clauses and go back to the first clauses to find the persons who are contra-distinguished from the residuary legatees by the word "other" seems to us neither reasonable nor grammatical. We think it must mean other than "the said" (six) "societies," or mean other than the special legatees.

Still it would seem as if "other" ought to mean something, and we ask ourselves how did the word get in there?—what was in the scrivener's mind?—or what was the confusion in his mind that led him to use it?

The only explanation which seems at all satisfactory is this:

The codicil starts with the distinction between residuary legatees and all the others, whom we may call special legatees. This distinction indeed runs through will and codicils. The special legatees are to be paid in full—if there is a deficiency the loss must be apportioned on these societies—the residuary legatees.

When the scrivener supposes a deficiency, he says—"if my property should not be sufficient to pay the said societies the amount specified to them in my will and codicils, the residue shall be divided among them in proportion to the bequests specified to each of them." Here "*residue*" means what shall remain after paying the special legatees, as distinguished from the residuary legatees; and this is the proper use of the word, and appropriate language to describe what is to be divided among the residuary legatees. The sentence then goes on to suppose an excess; "and if there shall be more than enough to pay the whole amount so specified, then the same shall be divided among my other legatees in proportion to the amounts of their special bequests." Probably the draftsman, when he used the words "the same" had in his mind the same idea that he had when he used the words "the residue" just before, viz: *what shall remain after paying the special legatees*, and it is quite obvious that he would then use the words "my other legatees" as synonymous with "my residuary legatees." This will be plain if we insert in place of the words "the residue," and "the same," words which specifically show what the residue is; thus—if my property should not be sufficient to pay the said societies the amounts specified to them in my will or codicils, then *what shall remain after paying my special legatees* shall be divided among the said societies in proportion to the bequests specified to each of them; that is the exact meaning of the clause as it stands originally; and if there shall be more than enough to pay the whole amount so specified, then *what shall remain after paying my special legatees* shall be divided among my other legatees, &c.

When we consider that the division of "the residue" was the subject matter of this paragraph in the will, and look at the idea in the mind of the draftsman, and then at the structure of the sentence—the first clause supposing a deficiency when "the residue"

shall be divided, and the second an excess when "the same" shall be divided,—we readily see how he referred the words "the same" back to the words "the residue," as meaning the same thing, and thus how "my other legatees" was used to mean the residuary legatees. While this was probably the writer's *idea*, the words "the same," in their grammatical connection, do not refer back to "the residue," but to the words immediately in juxtaposition, viz: "if there shall be more than enough to pay the whole amount so specified," that is, *what is left after paying the specific bequests to the societies*, "shall be divided among my other legatees," &c. Thus having one idea in the mind, that of "the residue," and referring the words "the same" to that idea instead of observing that the grammatical construction would signify by those words a different idea, we perceive how the writer got confused and expressed one idea while he really meant another; and thus, while he was thinking that "the same" meant "what will remain after paying the special legatees," (in which case other legatees would mean other than the special legatees—that is, the residuaries,) it did not occur to him that critical and grammatical accuracy would construe "the same" to mean what will remain after paying the special bequests to the six societies, (in which case other legatees would mean other than the six societies.) The thing to be divided was the residue—and when he says "the same shall be divided," he was thinking of what he had meant when he said "the residue shall be divided," and that was "what shall remain after paying special legatees." With this idea in his mind he would use "other" as synonymous with "residuary."

He seems to have felt that his idea was confusedly expressed, for he goes on in the next clause immediately succeeding to explain what he meant by "the residue," and "the same." He says, "meaning what shall remain after paying other special bequests and legacies," &c. Now if he did mean by "the same" what shall remain after paying other special bequests—that is, other than bequests to the societies—or, what is the same thing, what shall remain after paying bequests to special legatees, then the whole sentence thus explained would read thus,—if there shall be more than enough to pay the whole amount specified in my will as going to the said societies, then what shall remain after paying special legatees shall be divided

among my other legatees,—other meaning residuary legatees—they being the only ones who were other than special legatees.

However the obscurity arose, it is clear to us, that the very plain and emphatic statement of who should be "residuary legatees" ought not to yield to an indefinite expression which seems to have inaccurately expressed the writer's meaning; especially when he endeavors to correct and explain his meaning in the next clause of the same sentence; and when the general tenor of the will and of the surrounding circumstances by which it must be interpreted, harmonizes with the clear and positive words of the testatrix when expressing her intent on the very point in controversy.

The judgment of the county court affirming the decree of the probate court and so certifying to that court, is affirmed.

LUTHER C. PORTER *v.* AARON C. WHEELER.

Account. Partnership. Pleading.

There can be no revision of the merits of the judgment to account on the hearing before the auditor, or on the hearing upon his report.

Under an agreement between the partners at dissolution, that the defendant should take and collect the partnership demands, and pay to the plaintiff one-half the sum realized therefrom, after deducting the expenses of collecting, the defendant sent out his agent, H., to collect the same, and paid him therefor two dollars per day and expenses, the same as he had been paying him previously. Had H. continued in the defendant's individual business while engaged in collecting these demands, his services would have been worth four dollars per day to the defendant. *Held*, that the defendant should be allowed what it cost him to collect said demands, not what profits he would have gained by employing H.'s time in other business.

The action of account was the proper action to settle and adjust the respective rights of the parties in said transaction.

ACTION OF ACCOUNT. An auditor was appointed who reported substantially as follows:

The defendant, prior to 1855, had employed the plaintiff in the business of selling and delivering fruit trees in different parts of the country, and, among other places, in the province of *New Brunswick*,

and the defendant having taken or sent to that place a large number of fruit trees, it was agreed between the plaintiff and defendant, in writing, that they should deliver the New Brunswick sale of trees made in 1855 by the plaintiff for the defendant, and should divide the net profits after deducting the expenses of selling and delivering said trees, and also the wholesale price of the trees, which was to be $10. per 100, furnished and packed by the defendant, at his place in or near Rochester, N. Y., in the spring of 1856.

They sold and delivered about 30,000 trees under said written agreement before the first of June, 1856, the sales amounting to about $6000. They took notes for a part, charged some in account, and received the money for a part to the amount of about $2200. The parties met at Portland and had a settlement on the 2d or 3d day of June, 1856, and "agreed to throw up the partnership." The notes and accounts left unpaid went into the hands of the defendant. The plaintiff was to have one-half of what was realized from the demands, after deducting all expenses and cost of collecting them, and paying the defendant $3000. for the trees.

The defendant employed his agent, C. M. Hubbell, who was trusty and efficient, to collect said demands; and item No. 4 of the defendant's account, which was the main item in controversy, was for loss to the defendant on Hubbell's time in being thus taken away from the defendant's business.

In respect to this the auditor reported that Hubbell was an agent of the defendant in selling fruit trees and collecting accounts, at a stipulated price of two dollars per day and expenses. He had been in the business until he had become acquainted with it, and his time was then worth to the defendant four dollars per day, or would have been if he had remained in the defendant's individual employment. Other facts are stated in the opinion of the court. The court at the June Term, 1860, POLAND, Ch. J., presiding, rendered judgment, on the auditor's report, for the plaintiff to recover the sum of $86.,— to which the defendant excepted.

Wing & Lund, for the defendant.

B. N. Davis, for the plaintiff.

KELLOGG, J. The defendant, on the coming in of the auditor's report in this cause, filed exceptions to it for two alleged causes, viz:

(1), that the facts found by the auditor are not sufficient in law for the plaintiff to recover in this action of account, and that the action should have been an action of assumpsit and not of account; and (2), that the defendant and not the plaintiff is entitled to a judgment on the facts reported. The county court having rendered a judgment for the plaintiff on the report, these grounds of exception to the report are now to be considered in this court.

I. The defendant insists that the facts found by the auditor are not sufficient to support the action of account. After a judgment to account in this action, a defence of this character cannot be regarded as available. The declaration charges that the relation of partners existed between the plaintiff and defendant from 1st December, 1855, to 1st July, 1857, and the defendant claims that it is found by the auditor that the partnership was dissolved in June, 1856, so that in fact the relation of partners continued between the parties for only a part of the period alleged, in the declaration. In *Bishop* v. *Baldwin*, 14 Vt. 145, it was held that if, in this action, the defendant suffer judgment to account to pass by *nil dicit*, he thereby waives all defences which he might have pleaded, and so concedes all the facts stated in the declaration, except his being in arrear, and that the relation upon which the account is claimed is thus conclusively fixed, and that nothing can be pleaded before auditors which was, or which might have been, decided before the court or by the verdict. These rules have always been the recognized law of the action of account, and in *Pickett* v. *Pearsons*, 17 Vt. 470, they were again affirmed. There can be no revision of the merits of the judgment to account on the hearing before the auditor, or on the hearing upon his report. The question before him is not whether the action can be sustained on the facts stated in the declaration, but whether, at the time of the accounting, the defendant is in arrear for any sum which he is liable to account for to the plaintiff. The judgment to account establishes the facts alleged in the declaration, and the duty of the defendant to render the account demanded, and the defendant is estopped by the judgment from denying the facts or the relation upon which the account is claimed. In *Bishop* v. *Baldwin*, *ubi supra*, which was an action of account charging the defendant as a partner with the plaintiff, the auditors heard evidence in relation to the part-

nership, and reported upon it, but it was held that, after the judgment to account, the defendant could not object that he was not liable to account as partner, and he was excluded by this judgment from making the very defence now attempted. It appears in the auditor's report that he has allowed no items of account in favor of the plaintiff except such as arose from business transactions which occurred before the time when, as the defendant claims, the partnership relation was terminated, and while that relation was still existing. The defendant's liability to account to this extent in some form of action would seem to be beyond question; and we understand from the auditor's report that the joint or partnership interest of the parties in the outstanding demands due to them was not intended to be affected by the agreement made in June, 1856, by which the partnership as to future operations was terminated. The interest of the plaintiff in the outstanding demands, and in the profits of the business already done, continued the same after, as it was before, this agreement was made. There is no ground, therefore, for the claim that, by the arrangement then made, the relations of the parties as to their past business was changed, and that, in consequence of the arrangement, the defendant assumed upon himself a new duty which could only be enforced in an action of assumpsit. We find nothing in the facts reported which shows that the plaintiff acquired any new or different right in respect to the division of the profits of the past business under this arrangement, and the action of account was the proper action to settle and adjust the respective rights of the parties arising out of that business and its profits.

II. The defendant insists that the judgment on the auditor's report should have been in his favor,—as it would have been, if his claim against the plaintiff for loss on the time of Hubbell, the agent employed to collect the demands in New Brunswick, had been allowed. The defendant paid to Hubbell two dollars per day for this service, and this was allowed to the defendant by the auditor. But the auditor reports that Hubbell had been and was in the defendant's employment at the time he entered upon this service, and that his time would have been worth four dollars per day to the defendant if he had remained in the defendant's business while employed in collecting these New Brunswick demands; and the defendant now

claims the difference between the compensation actually paid to Hubbell for his time and the value of that time in the defendant's business, as thus reported by the auditor. The defendant sent out Hubbell to collect the demands, and has been allowed all that he paid to him as compensation for his time and expenses. The question is, what was this service worth,—or rather, what did it cost the defendant;—not what profits the defendant might have gained by employing Hubbell's time in some other kind of business. We are satisfied with the disposition which the county court made of this claim. The defendant is fully reimbursed for all of his actual expenses by the allowance made by the county court, and beyond this there is no justice in his claim. An allowance beyond the compensation actually made to the agent could only be justified by proof that it was stipulated for, or contemplated, between the parties, and the auditor's report contains no finding of that character.

As no other questions have been made in the case, the judgment of the county court in favor of the plaintiff is affirmed.

Horace Evans *v.* Daniel Beckwith.

Interest. Receipt. Contract.

By an arrangement between all parties interested the defendant bought a store of goods that had been attached, and gave his receipt therefor. It was stipulated in the receipt, and agreed upon independent of the receipt, that the defendant should not be called upon for payment until a suit pending about the ownership of said goods was decided. *Held*, that under either aspect of the case no interest was allowable until demand of payment and refusal; as no implied contract to pay interest arises, except where the party has neglected to make payment after it was his duty to do so.

Assumpsit upon a receipt given by the defendant to the plaintiff for a quantity of goods attached by the plaintiff as sheriff, on writs in favor of S. S. Thompson and Chamberlin & Fletcher, against Fife & Wadleigh. Plea, the general issue. Trial by the court, December Term, 1863, Poland, Ch. J., presiding.

Upon trial it appeared that Fife & Wadleigh, being owners of a store of goods, failed in October, 1856, and on the 14th of the same

month the plaintiff attached and took the goods in their store upon the two writs above named. Previous to the attachment one George W. Wadleigh had taken possession of said goods, and claimed to be the owner of them by purchase from Fife & Wadleigh. The creditors of Fife & Wadleigh claimed that such sale was fraudulent. George W. Wadleigh commenced an action of trespass against the plaintiff for taking said goods, and the same was expected to be litigated.

An arrangement was thereupon made between the said creditors, the attorney of George W. Wadleigh, and the defendant, (who was a merchant at Burke,) to sell said goods to the defendant at a discount of thirteen per cent. from their cost, and it was agreed between the said creditors and the attorney of George W. Wadleigh, that such agreed price should be taken as the value of the goods when attached by the creditors. It was also arranged between all said parties that the defendant should execute a receipt for the goods to the plaintiff, and that he should not be called upon for payment until the question of ownership was decided between the creditors and George W. Wadleigh, if he succeeded in establishing his title.

It did not appear that at the time of making this arrangement and sale of goods to the defendant, anything was said as to whether he was to pay interest on the price of said goods. This arrangement was made at St. Johnsbury, and subsequently the defendant went to the office of Mr. Bartlett, in Lyndon, who was the attorney of said creditors in said actions, when Mr. Bartlett wrote the receipt declared on, and the defendant executed it. At the same time Mr. Bartlett gave to the defendant a writing signed by himself as attorney of said creditors, stating that the defendant was not to be called on to pay for the goods until the suits about the ownership should be ended. This paper was dated November 21st, 1856, which was the day it was executed, as well as the receipt, but the receipt was dated back to the date of the attachment, October 14th, 1856.

It appeared that the creditors had no knowledge of the giving of such paper by Mr. Bartlett to the defendant, and gave no express authority to him to give it, but the paper truly expressed the actual agreement made by the creditors themselves. The defendant immediately placed said goods in his store, and proceeded to sell them out

to customers as he had occasion. Judgments were recovered in both the suits on which the goods were attached, at the December Term, 1856, and executions issued and placed in the hands of O. P. Wakefield, sheriff, but no demand was made on the plaintiff or the defendant by the officer holding said executions.

The suit in favor of George W. Wadleigh against the plaintiff for said goods terminated by a judgment in favor of Wadleigh, at the December Term, 1861, for the price of the goods, as sold to the defendant, and interest thereon from the time of the taking, and the judgment was immediately paid up by said creditors. The defendant being then called upon by them to make payment for said goods, did pay to them the amount specified in the receipt, but refused to pay interest, claiming he was not bound to do so. The creditors received the amount of the principal, but claimed they were entitled to recover interest from the date of the receipt, and refused to surrender the receipt, and caused this suit to be brought to enforce payment of the interest.

Upon these facts the court decided that the defendant was not bound to pay interest, and rendered judgment for the defendant,— to which the plaintiff excepted.

G. C. & G. W. Cahoon for the plaintiff, insisted that the defendant was legally bound to pay interest.

1st. The receipt for the goods was dated back to the day of the attachment, the defendant understanding the rule of *damages*, and that they were to be computed from that time.

2d. He was aware of the nature of the suit, *Wadleigh* v. *Evans*, that it was an action of trespass, and was legally bound to know, as he in fact did know, that if Wadleigh sustained his claim he would be legally entitled to interest on said sum from the date of the attachment, and the exceptions find that Wadleigh obtained judgment at the December Term, 1861, for the price of the goods as sold and interest thereon from the time of taking.

"In trespass for taking away property, the value of property at the time of taking, with interest thereon is the measure of damages." *Wire* v. *Church*, N. C. p. 95; *Wood* v. *Smith*, 23 Vt. 709; *Branin* v. *Jackson*, 19 Maine, 361; Eastman's Dig. p. 207, sec. 12.

J. Ross, for the defendant.

By the rule of our court, where there is no contract for interest, none can be recovered till after the money becomes due or payable, and where a demand is necessary, none till the demand is made. *Evarts* v. *Nason's Est.*, 11 Vt. 122; *Newel* v. *Ex'r of Keith*, 11 Vt. 214; *Abbott* v. *Wilmot*, 22 Vt. 437; *Porter et al.* v. *Munger*, 22 Vt. 191; *Smith* v. *Moore*, 25 Vt. 127; *Gleason* v. *Briggs*, 28 Vt. 136; *Sprague* v. *Est. of Sprague*, 30 Vt. 483.

BARRETT, J. The only question presented by the exceptions, and discussed in the argument is, whether the plaintiff is entitled to interest on the sum expressed in the receipt, from the time the property was sold, for which the receipt was given. It appears that the defendant paid the principal sum at the time he was called upon, conformably to the terms of the receipt, and the understanding and agreement of the parties to the transaction.

Whether the question be considered upon the contract evidenced by the receipt, or upon the evidence as to the understanding of the parties, outside of the receipt, the same result would follow. It is to be observed that the receipt is in the ordinary form of a receipt taken by an officer on the attachment of property.

It is well settled that, on such a receipt, or in a suit on such a receipt, interest is allowable only from the time demand is made, and refusal to deliver upon such demand.

The defendant stipulated to deliver the property, or pay a certain amount of money—the value of the property—to the plaintiff, or any other officer who may have an execution issued on the judgment rendered in the action on which said property had been attached. Of course, by the terms of the receipt, he was under no duty to deliver the property, or pay the money until demand should have been made. When such demand was made the defendant paid the amount of money stipulated.

Now, as to the subject, as shown by evidence outside of the receipt;—the exceptions state that it was arranged between all of the parties, that the defendant should execute a receipt for the goods to the plaintiff, and that he should not be called on for payment until the question of ownership was decided, &c.

At the time said receipt was executed, Mr. Bartlett, as attorney for the attaching creditors, gave the defendant a paper stating that

the defendant was not to be called on to pay for said goods until the suit about the ownership should be ended. Whether the defendant's obligation and liability be regarded as arising upon the receipt he executed, or upon the arrangement between all the parties, as stated in the exceptions, conformably to which were the terms of said paper, executed by Mr. Bartlett, the result is the same.

In either case there is no *express* contract to pay interest. No implied contract to pay interest arises except where the party has neglected to make payment after it was his duty to do so.

But the case shows that the defendant, in fact, made payment of the sum stipulated, at the time his duty to do so became operative. This being so, it is impossible for us to see upon what ground the plaintiff's claim in this case can be maintained. *Brainerd* v. *Cham. Trans. Co.*, 29 Vt. 154; *Sprague* v. *Est. of Sprague*, 30 Vt. 483; *Vt. & Can. R. R. Co.* v. *Vt. Cen. R. R. Co.*, 34 Vt. 1; and many other cases.

The judgment is affirmed.

GEORGE B. WALKER *v.* P. M. WILMARTH.

Sheriff's Sale. Damages.

The plaintiff's property was attached and, at the request of the attaching creditor, sold under the provisions of § 41, ch. 33, G. S., but the officer did not give the plaintiff *written* notice of the application. *Held*, that the sale was illegal although the plaintiff had *verbal* notice and was present at the appraisal and sale, and did not object.

Where an officer attaches and holds property lawfully, but sells it illegally, it having deteriorated without his fault, in an action on the case he is liable only for its value at the time of the sale.

ACTION ON THE CASE. Plea, the general issue, with a notice. Trial by Jury at the June Term, 1864, POLAND, Ch. J., presiding.

It appeared that on the 24th day of November, 1859, the defendant, then constable of the town of Lyndon, served a writ in favor of one Whipple, by attaching and taking into his possession the plaintiff's horses and other personal property.

It was conceded that at the December Term, 1862, Whipple was non-suited; that upon the application of the plaintiff in that suit, the property attached on the writ was sold at public auction by the defendant on the 19th day of December, 1859; that no written notice was ever given by the defendant to the plaintiff of the application to have the property appraised and sold, in any form, but the plaintiff admitted that he did receive a verbal notice of the application from the defendant.

The defendant gave evidence tending to prove that the plaintiff was present at the time said property was appraised, and did not object that he had not received proper notice. The plaintiff denied that he was present at the appraisal, and gave evidence tending to prove that he was not, but conceded that he was present at the time the property was sold by the defendant.

The mare attached was taken by the defendant to the barn of one Estabrooks to be kept, and in a day or two and before the appraisal, she injured herself so that she died, very soon after the sale. She was sold for twenty-six cents which was all she was worth at that time. It was not claimed that the defendant or Estabrooks who had the care of the mare, were in any way in fault for the injury to the mare, nor was it claimed but that all proper means were taken to cure the injury.

The plaintiff claimed that he was entitled to recover the value of the mare when attached, but the court held and so instructed the jury that upon these facts the plaintiff could only recover so much as the mare sold for,—to which ruling the plaintiff excepted.

The court further held that the want of a written notice from the defendant to the plaintiff of the application to have property sold on the writ made the sale defective and illegal, and that the plaintiff would be entitled to a verdict for the value of the residue of the property, with interest from the time of sale. The defendant excepted to this ruling and instruction to the jury.

Verdict for the plaintiff.

Thomas Bartlett, for the plaintiff.

The plaintiff's presence at the appraisal and sale is no license or approval of the irregularity of the previous proceedings.

When an officer sells chattels attached on *mesne process* without

pursuing the provisions of the statute of 1822 and the defendant prevails in the suit the officer becomes a trespasser *ab initio* and is liable to an action without any previous demand on him for the chattels. *Wallis* v. *Truesdell*, 6 Pick. 455. See Revised Statutes of Mass., page 553, from which it seems our statutes have been drafted.

G. C. & G. W. Cahoon, for the defendant.

The plaintiff can only recover what the mare sold for. Officers attaching property on *mesne process* are not liable for injuries occasioned without any want of ordinary care on their part. *Bridges* v. *Perry*, 14 Vt. 262; *Smith* v. *Church*, 27 Vt. 168; *Miller* v. *Gilbert*, 47 Maine, 32; *Sawyer* v. *Middletown*, 10 Vt. 237. See also Story on Bailments, p. 27, § 25.

The plaintiff has waived his right to written notice. *Derby et al.* v. *Johnson*, 21 Vt. 17; *Campbell* v. *Worthington*, 6 Vt. 448; *Bennett* v. *Stickney*, 17 Vt. 531; *Kellogg, ex parte*, 6 Vt. 509; *Forbes et al.* v. *Davison*, 11 Vt. 660; *Eaton* v. *Houghton*, 1 Aik. 380.

Such notice may be proved by the acts of the parties, or presumed from other circumstances. *Wood* v. *Stewart*, 7 Vt. 149.

Walker is estopped from now claiming that the appraisal and subsequent sale was illegal, as his conduct was such as to induce Wilmarth to believe that he did not object. *Hicks* v. *Cram et al.*, 17 Vt. 449; *Strong* v. *Ellsworth*, 26 Vt. 366; *White* v. *Langdon*, 30 Vt. 599.

BARRETT, J. The plaintiff's property having been attached on *mesne process* by the defendant, as constable, was sold by him on the writ at the request of the attaching creditor, pursuant to the provisions of the Compiled Statutes. The attachment was made on the 24th of November, 1859. On the 28th of October, 1859, the act was approved and went into effect, amending § 30 of ch. 31 of the Compiled Statutes, so as to require *written* notice to be given by the officer to the other party, when application is made to him by one of the parties to sell the property upon the writ.

In the present case the plaintiff was not notified as required by this amendment of the statute, though he did receive a *verbal* notice from the defendant, of said application.

Evidence was given tending to show that the plaintiff was present

at the appraisal, and did not object to it, and the plaintiff admitted on the trial that he was present when the property was sold by the defendant.

The county court held said sale to be defective and illegal by reason of such want of written notice of said application to sell the property, and this ruling is the ground of the defendant's exception.

The proceeding by attachment on *mesne process*, upon the mere motion of the plaintiff in such process, without any verification that he has a valid, or even a probable cause of action, to take possession of the defendant's personal property, and hold it inexorably from his possession, use and control till final judgment, and, in the mean time, upon certain contingencies, to sell and dispose of it, is well regarded as carrying the law to the extreme verge of reason or toleration, as affecting the ordinary and established rights of property between man and man. A resort to this proceeding is warranted only by specific statutory law, and, in order to be justified in the given instance, the proceeding must be shown to be conformable to the provisions of such law. The owner of the property, which is the subject of the proceeding, is affected in his rights, only by force of the law authorizing the proceeding, and he may assert and stand upon those rights, unless it be shown that the law has supervened upon them in the mode, and by the instrumentalities therein prescribed.

This is not controverted by the defendant's counsel in the present case. But it is claimed that the plaintiff, having received verbal notice of the application, and having been present at the appraisal and sale, without objecting to the proceedings, is, as matter of law, to be taken to have waived his right to insist upon a compliance with the provision of the statute requiring notice in writing.

We think this is not tenable. The plaintiff had a right to have the defendant, as the instrument of the law, in behalf of the party making the attachment, to take his own course in subjecting the property attached to the provisions of the law. Whether he would consent to a sale, by agreement with the other party, or, whether he would apply for a sale, as he might do under the statute, was a matter in which he was free to determine and act for himself. He saw fit to do neither. When the attaching creditor moved in the matter

to procure a compulsory sale, the plaintiff could in no way interfere to control that proceeding. Upon application being made to the officer, the course to be taken by the officer is specifically prescribed by the statute, and that course is to be taken entirely independent of the will or wish of the plaintiff. With that course he had not the right to interfere to control the officer; nor was it his duty to relieve the officer from doing all things required by the law in order to make valid the proceedings he was pursuing. Whether the plaintiff was present or absent when certain steps were taken in that proceeding could make no difference, so far as any defect in it is concerned, unless he is chargeable with knowledge of such defect, and with the duty of then making objection to the proceeding on account of such defect. In the present case, the plaintiff could hardly be held to occupy a position in which the presumption, that every man knows the law, would be operative against him; and much less can the defendant in this case claim it, when the reason, assigned by counsel, why he did not give notice in writing, is that he did not then know of the then recent act, requiring notice to be given in that manner. And clearly he was chargeable with no duty to object; for he might, in silence, leave the adversary party and the officer to their own hazards in asserting rights against him, given by arbitrary statute, and involving no considerations of equity or morality. In saying this, we are not to be understood as holding that the plaintiff might not, affirmatively, have waived the defect in the notice. That question is not involved. The only question is, whether the mere fact of his being present at the appraisal and at the sale and not objecting, constitutes such waiver; and we clearly think it does not.

In a proceeding like the one under consideration, and which, at best, is harsh and repulsive to the ordinary apprehension of the rights of property, and may so easily be made an instrument of unjust oppression, we think courts should require a scrupulous compliance with the statutory provisions, in order to justify its use, when rights asserted in virtue of such proceeding are called in question.

The other question in the case, arises upon exception taken by the plaintiff to the ruling of the court, that, upon the facts shown by the evidence, he could only recover so much as the mare sold for, which, it is found, was all she was worth at the time.

The plaintiff claims that he was entitled to recover the value of the mare at the time she was originally taken on the attachment.

This is an action on the case sounding in damages, for the non-return of the property on the termination of the suit on which the property was attached.

It appears that the original attachment, and all the proceedings of the defendant were justifiable under the process, down to the act of selling the attached property. The mare injured herself before the appraisal, so that she died soon after the sale,—the defendant being in no fault, either in respect to her injury, or the measures taken for her cure. It is not controverted by the plaintiff that, if the defendant had so proceeded as to have made a valid sale of the mare, with the other property, upon the writ, he would have been accountable only for what he got for the mare upon the sale,—or, in other words, it is not claimed that an officer is liable for accidents and injury to property held by him under attachment upon *mesne process*, which happen without any fault of act or neglect on his part. The law of this subject seems to be firmly established by a series of adjudications in this and other states. See *Bridges* v. *Perry*, 14 Vt. 262; *Miller* v. *Gilbert*, 47 Maine, 32.

But it is claimed, that, by reason of the illegality of the sale, the defendant became trespasser *ab initio*, and, therefore, the measure of damages is the value of the property at the time it was taken on the attachment. Whatever might have been the rule, if the plaintiff had brought *trespass* instead of *case*, it seems quite clear that he cannot, as matter of law, insist upon that measure of damages in the present case.

Under the declaration the question as to the character of the original taking does not arise. The *gravamen* is the non-return of the property in pursuance of the alleged duty of the defendant, without any averments by way of aggravation. The declaration treats the original attachment, and the holding of the property by the defendant, as lawful; and the only ground of action, or of liability for damage, is the breach of duty in not returning the property.

The damages, therefore, are to be measured with reference to that breach, upon the assumption that the acts of the defendant, up to that time, had been lawful.

If his taking and holding of the property were thus lawful, his liability is only for the property at the value for which, as such officer, he would be accountable to the party recovering in the suit on which it had been attached. As before shown, he would not be chargeable for deterioration of the property by reason of causes involving no fault on his part, in the keeping and care of it.

We think, therefore, upon the facts, the county court put the true rule to the jury, as to the value of the mare.

The judgment under both exceptions is affirmed.

JOSEPH FARRAR *v.* GEO. C. ROLLINS.

Trover.

Where there is no claim to borrowed property and no objection to the owner's taking it, a mere refusal to return it on demand to the place whence it was taken, according to the agreement when borrowed, is no conversion.

TROVER for a sled. Plea, the general issue. Trial by jury, June Term, 1864, ALDIS, J., presiding.

The plaintiff's evidence tended to show that the defendant, by his hired man, Cole, borrowed a sled of him to use during the season of threshing, and agreed to return it when he was done; that after he was done the plaintiff requested him to return the sled to his house where he got it, and the defendant wholly refused, upon the ground that he never borrowed it or authorized Cole to borrow it, but that Cole borrowed it for his own use.

There was no other evidence of conversion, or of the defendant's making any claim to the sled.

The court instructed the jury, for the purposes of this trial, that if they found the facts as the plaintiff's evidence tended to show, it would amount to a conversion,—to which the defendant excepted.

Peck & Colby, for the defendant, cited *Heald* v. *Carey*, 9 L. & Eq. 429; *Sharpe* v. *Pratt*, 14 C. L. R. 198.

O. S. & C. C. Burke, for the plaintiff.

POLAND, Ch. J. It is fairly to be inferred from the exceptions that the plaintiff's sled was in the defendant's possession, at the time the plaintiff requested the defendant to return it.

The plaintiff did not claim that the defendant obtained possession of it wrongfully, but that he loaned it to him, or to his servant, so that there was no conversion by a wrongful taking. But the plaintiff claims that it was unlawfully detained and withheld from him by the defendant, when he called for or demanded it.

The plaintiff requested the defendant to return the sled to his (the plaintiff's) house, where he got it. This the defendant refused to do, on the ground that when Cole borrowed the sled, he borrowed it for himself, and not for the defendant. The defendant made no claim to the sled, and no objection to the plaintiff's taking it; he only refused to carry it to the plaintiff's house, claiming he was under no obligation to do so. If the borrowing was really on behalf of the defendant, so that it was his duty to have returned it to the plaintiff, his refusal to do so was no conversion; it was a mere breach of contract, for which he might be liable in a proper action.

The principle is undoubted, that where one has the property of another in his possession, with no right to retain it, and being called on to surrender it to the owner, refuses, he is guilty of conversion, and trover will lie. But here was no refusal to surrender the sled to the plaintiff, and no withholding it from him; indeed the plaintiff did not ask to have it delivered to him. He claimed that the defendant should carry the sled to his house, which the defendant refused. If this refusal was wrongful, it was no conversion. There was no repudiation of the plaintiff's right to the sled, and no assertion or exercise of any dominion over it by the defendant, inconsistent with the plaintiff's right. The plaintiff could have had his sled when he called for it, but insisted the defendant should fulfill his duty, or perform his contract by carrying it home.

Judgment reversed and case remanded.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

GENERAL TERM,

HELD AT

MONTPELIER, NOVEMBER, 1864.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

DAVID WEEKS *v.* MOODY M. BOYNTON.

Mortgage. Contract. Estoppel. Book Account.

The defendant executed to the plaintiff a mortgage deed of his farm, with a condition securing to the plaintiff his support and maintenance during his natural life. The condition of defeasance contained a provision as follows, viz: "or if I shall have an opportunity to sell said farm and shall wish to do so, I shall have the right to do so by paying or securing to the said Weeks (plaintiff) such sum and in such manner as the judge of probate for the district of Caledonia, for the time being, shall consider will be just and right for the remainder of the life of the said Weeks from such date." *Held*, that there must be a concurrence of both conditions, viz: an opportunity and desire to sell, before the judge of probate would be authorized to act in the premises; therefore in the absence of all proof of the existence of these conditions, or of the former only, an award of the judge substituting a different mode of performing the condition of defeasance, would be inoperative.

The award provided that the defendant should execute and deliver to the plaintiff a bond in a sum specified, with one or more sureties, to the acceptance and approval of the cashier of the Bank of Caledonia, conditioned for the faithful performance of the award, &c. *Held*, that this provision conferred upon the cashier a trust or discretion, which by the condition of defeasance, was vested in the judge alone.

The plaintiff's counsel remarked in his presence, when the award was made, that "they were satisfied, and had come out better than they had expected." *Held*, that the plaintiff's silence, when this remark was made, was not equivalent to such an acceptance of the award as would change his rights under the mortgage.

When one of the parties to a book action does not insist upon certain items of his account, and for this reason the auditor disregards them without going into their merits, no question can properly afterwards be raised by the said party in respect to them.

Two suits,—one an action of ejectment, the other an action of book account,—in favor of the same plaintiff against the same defendant.

The ejectment suit was tried by the court under the plea of the general issue, at the June Term, Caledonia County, 1862, and judgment was rendered for the defendant. The book action was heard upon the report of an auditor, at the December Term, 1861, and the court rendered judgment for the defendant; POLAND, Ch. J., presiding in both actions. The plaintiff excepted to the judgment rendered in both cases. The material facts in both cases are sufficiently set forth in the opinion delivered by the court.

M. Hale and *Wing & Lund*, for the plaintiff, maintained that the agreement to arbitrate was not binding on the plaintiff. There was no mutuality about it. French, the judge of probate of the district of Caledonia, acted as arbitrator, not as judge of probate. The condition in the deed on which the defendant could apply to the probate court, *i. e.*, an opportunity to sell, had not occurred, therefore the acts of the arbitrator were void, and constituted no bar to the action of ejectment. If this was an arbitration, the right of revocation existed, and was exercised, and not afterwards waived by the plaintiff. The award was void. If void it was never affirmed or made valid by the acts of the plaintiff or his counsel. *Odlin* v. *Gove*, 41 N. H. 465; *Hicks & Co.* v. *Cram et al.*, 17 Vt. 449; *Walbridge* v. *Kibbee*, 20 Vt. 543; *Strong* v. *Ellsworth*, 26 Vt. 366; *Downer* v. *Flint et al.*, 28 Vt. 527; *White* v. *Langdon*, 30 Vt. 599.

B. N. Davis, for the defendant, maintained that the provision of defeasance in the deed should receive a reasonable, not strict, construction; that if the defendant honestly desired to sell the farm, the contingency had happened upon which he could call upon the judge of probate to act. The plaintiff waived all objection to the judge's jurisdiction, and acquiesced in the award subsequently. The award followed the submission. The agreement to the submission was mutual. *Austin* v. *Austin et al.*, 9 Vt. 420; *Henry* v. *Tupper et al.*, 29 Vt. 358; *Herrick* v. *Belknap et al.*, 27 Vt. 674. The judge of probate delegated no authority in his award not belonging to him to delegate.

KELLOGG, J. The defendant, on the 24th March, 1856, executed to the plaintiff a mortgage deed, with a condition securing to him his support and maintenance during his natural life, and the fulfillment of other provisions for his benefit in connection with such support. This mortgage deed conveyed a farm of land which had been on the same day conveyed by the plaintiff to the defendant. The condition of defeasance contained in the mortgage deed also contained a further provision expressed in these words, viz: "Or, if I" (defendant) "shall have an opportunity to sell said farm and shall wish to do so, I shall have the right to do so by paying or securing to the said Weeks" (plaintiff) "such sum and in such manner as the judge of probate for the district of Caledonia, for the time being, shall consider will be just and right for the remainder of the life of the said Weeks from such date." In January, 1861, the judge of the probate court for the district of Caledonia, on the application of the defendant, and on notice to the plaintiff, proceeded to hear the parties in reference to the subject of this provision, and made a decision and award in writing, directing that the defendant should, in the place and stead of the stipulations and provisions contained in the mortgage deed, pay to the plaintiff, during his natural life, the sum of one hundred and thirty dollars each year, at the Bank of Caledonia, in Danville, in two half yearly payments, one to be made on the first day of July and the other on the first day of January in each year, and the first payment to be made on the first day of July, 1861, and that the defendant should, within sixty days from the date of the award execute and deliver to the plaintiff a bond, with one

or more sureties, to the acceptance and approval of the cashier of the Bank of Caledonia, whose approval and acceptance should be indorsed thereon, in the sum of two thousand dollars, conditioned for the faithful performance of the award, and that the said mortgage deed should remain in full force and virtue to secure the payments named in the award, and that the award should in no way operate to discharge the mortgage security, but should become a substitute for the condition of defeasance contained in the mortgage. At the hearing before the judge of the probate court, the plaintiff objected to any hearing or adjudication by the judge in the matter; but, the judge deciding to proceed with the hearing, each of the parties submitted such evidence and arguments in reference to the defendant's application as they chose. The defendant had fully complied with the conditions of the mortgage deed, up to the first January, 1861, and he has also fully complied on his part with the terms or requirements of the award since that time. The plaintiff's right of recovery in the action of ejectment rests on a breach by the defendant of the condition of the mortgage. The main or principal question in this action is, whether this award was valid and binding, so as to substitute a different mode for the performance of the condition of the mortgage by the defendant. If it was valid, there was no breach of the condition of the mortgage by the defendant; but if, for any cause, it was invalid or inoperative, then the defendant has ever since the first January, 1861, failed to comply with the requirements of the mortgage, and the plaintiff is entitled to recover. This action was commenced on the 16th May, 1861, and it was admitted by the defendant in his testimony on the trial, as appears from the minutes of the presiding judge, which are referred to as a part of the case, that the plaintiff, before the commencement of the suit, called on him to provide for his maintenance and support, agreeably to the original provisions of the mortgage deed.

The conditions upon which the judge of the probate court was authorized to act, in ascertaining and awarding in respect to a substituted performance of the condition of defeasance were, that the defendant should have an opportunity to sell the farm, and should wish to do so. No question is made in respect to the existence of a desire on the part of the defendant to sell the farm, at the time when

he made the application to the judge of the probate court which led to the hearing of which this award was the result; and this limits the inquiry upon this point to the question whether the defendant then had an opportunity to sell the farm. It did not appear that the defendant had made any contract with any person to sell the farm, or that he had any specific offer from any person for the purchase of the farm, or that there was any evidence before the judge of the probate court on that subject. We think that the judge of the probate court was not authorized to act on the defendant's application except upon the concurrence of both conditions, and that it was essential to the validity of the proceeding before him that the defendant should have had an opportunity, as well as a desire, to sell the farm. This condition is stipulated for as the first and principal condition on which the judge is authorized to act, and its existence must be established before any foundation can be considered as laid for any action by him. We must give some meaning to these words in the condition of defeasance, and the expression is wholly nugatory, or without meaning, unless it is treated as the statement of an essential condition for any proceeding to substitute a different mode of performing the condition of defeasance. The award itself being silent in respect to any proof of the existence of this condition, the defendant cannot stand upon the award without furnishing proof that this condition actually existed when he made his application to the judge. Without such proof, the entire proceeding before the judge was wholly unauthorized, and was destitute of any foundation upon which it could rest for support. This defect in the proof is, as we regard it, fatal to the award, and renders it wholly inoperative. But this is not the only objection to its validity. The condition of defeasance provides that the judge of the probate court, whenever he may properly act on the subject, shall decide in respect to the "manner" in which the substituted security shall be given, and he is not authorized to delegate any part of his power or discretion to any other person. It would seem, therefore, that the provision in the award, requiring the bond which was executed by the defendant to the plaintiff to be accepted and approved by the cashier of the Bank of Caledonia, conferred upon the cashier a trust or discretion which, by the condition of defeasance, was vested in the judge alone, and

which was incapable of being shifted or delegated to any other person. The award required that this bond, when executed and approved by the cashier should be delivered to the plaintiff; but the bond appears to have been left with the cashier, and there is no fact stated from which we can infer that it was delivered to the plaintiff, or even that the plaintiff had any notice that it had been executed, or was in readiness for delivery. But, treating the requirements of the award as fully complied with by the defendant, the case is not relieved from the objection that the conditions upon which the judge of the probate court was authorized to act are not shown to have existed. Without this proof, his proceedings were unauthorized, and cannot be supported.

We find nothing in the case showing that the plaintiff consented to the award, or that he should be held as estopped from resisting it. The bill of exceptions states that his counsel, at the time when the award was made, said in his presence that "they were satisfied, and had come out better than they had expected." But this is a mere detail of evidence tending to show the fact, and is not a finding in respect to the fact itself; and we do not think that the plaintiff's silence when this remark was made, was equivalent to such an acceptance of the award as would change his rights under the mortgage.

These conclusions necessarily lead to a reversal of the judgment for the defendant in the action of ejectment. But it very distinctly appears that the defendant has fully complied with the requirements of the award in respect to the substituted performance which the award provided for in the place of the condition of the mortgage, and we find no reason to doubt his good faith in believing the award to be valid and binding. His breach of the condition of the mortgage is therefore to be regarded as unintentional, or purely technical; and a court of equity would relieve him from a forfeiture of the estate on such terms as would provide for the plaintiff a full compensation and indemnity for all which he has lost by reason of the breach complained of. *Austin* v. *Austin and Raymond*, 9 Vt. 420; *Henry* v. *Tupper et al.*, 29 Vt. 358. In making such a compensation to the plaintiff for the damages occasioned to him by the breach of the condition of the mortgage as would be just and equit-

able, the defendant should be allowed again to stand upon his rights under the mortgage. In the present posture of the case, the judgment of the county court in the action of ejectment is reversed, and the cause will be remitted to that court for a new trial.

The only questions which are now made by the plaintiff in the action on book account relate to the items of his account against the defendant numbered from 9 to 12, inclusive, and to his account against the defendant contained in the paper marked E. These are charges for money paid for keeping and shoeing the plaintiff's horse, and for repairs on the plaintiff's wagon, which, as the plaintiff claims, it was the duty of the defendant under the condition of the mortgage to defray. If this claim is well founded, it would give the plaintiff no right to make a charge on book account against the defendant for what is, in substance a breach of the condition of the mortgage, and these items cannot be considered as proper subjects of book account on any hypothesis which the plaintiff suggests. They were properly disallowed by the county court. In respect to the account contained in the paper marked E., the auditor reports that the whole of it, except a single item, "accrued more than six years ago, without credit or a new promise," and that the defendant claimed that it had been settled, and that he relied on the statute of limitations as a defence against it, and the auditor further states that he did not examine the merits of the charges, "especially as they were not insisted on by the plaintiff's counsel." No question arises on the auditor's report in respect to the excepted item. The statement of the auditor that the account "accrued more than six years ago" must be regarded as lacking precision and certainty in respect to the time when it did in fact accrue, and leaves the question in doubt. The expression, literally interpreted, would imply that it accrued more than six years before the making of the report, and this would not be sufficient to show that the account was barred by the statute. To make the statute of limitations applicable, it should appear that the account accrued more than six years before the commencement of the action. We have not thought it necessary to send the report back to the auditor for an amendment or a more specific finding in this particular, inasmuch as we regard the plaintiff's claim for these charges as controlled by the finding that they were not seriously

insisted on by his counsel at the hearing before the auditor. If they were not then urged seriously and in good faith as a ground of claim, the plaintiff cannot now complain that they were disregarded by the auditor. There was no error, on the facts reported, in treating these charges as waived or abandoned by the plaintiff; and we find no error in the judgment rendered by the county court in favor of the defendant on the report of the auditor. That judgment is accordingly affirmed.

CYRUS PERRIN v. JOHN GARFIELD, RUSSELL C. GARFIELD, BENJ. PATCH, JOSEPH PATCH, AND HAYDEN PATCH.

Adverse Possession. Prescription. Easement. Evidence.

Where a right has been acquired by adverse enjoyment, it will not be defeated by asking for and obtaining a license for a continued use from the owner of the servient tenement; but this would be evidence tending to prove that the previous possession was not adverse, or under a claim of right.

In 1833 F. erected a mill about a mile from the defendants' pond and entered into the use and occupancy of a dam and flume, previously built by C. at the outlet of the pond to supply his mill which formerly stood near the site of F.'s mill, and continued so to use it for eighteen years. His mill was almost wholly dependent on the water obtained by means of the dam and flume for its supply. *Held*, that in the absence of proof that F., or C. or his successors ever procured any license to erect or keep up said dam, or ever acknowledged any title in any one, the county court were warranted in finding F.'s use adverse.

Held also, that the county court were warranted, under the circumstances of this case, in finding that the owners of the servient tenement had notice of such use.

The presumption of notice was not rebutted by the fact that the lands about the pond were wild and uncultivated until 1850.

Held, that the easement would pass with the mill in a sale of the latter notwithstanding its character and distance from the mill.

TRESPASS for removing a dam and flume. Plea, the general issue, and trial by the court, June Term, 1862, Caledonia County, POLAND, Ch. J., presiding.

The following facts appeared from the evidence. There is a small natural pond in the west part of Wheelock, from which runs a small

stream emptying into Lamoille River. In 1821 one Cooke erected a saw-mill in Goshen Gore on said stream, about a mile below the outlet from said pond, and the next year erected a dam across said stream at the outlet of the pond, which raised the water in the pond about three feet. He also built a flume and gate at the outlet so that the water from the pond could be drawn off at pleasure for the use of the mill. The stream was so small and so little water raised by the dam at the mill that except in high water but little use could be made of the mill except for the supply obtained by drawing off the water accumulated by the dam at the pond. Cooke and his successors kept up this mill and the dam at the pond for about ten years, when the mill was burned. In 1833 one Foster erected a mill on the same stream about sixty rods above the Cooke mill on another lot in Goshen Gore, and went into the use and occupancy of the dam and flume at the outlet for his mill in the same manner Cooke had done. It did not appear that there was any contract or privity between Foster and the owner of the Cooke mill, as to the dam and flume at the outlet. Foster kept up and used his mill for eighteen years, and during all the time kept up and used the dam and flume at the outlet in connection with it. All the land about the pond during all this period up to 1850 was unoccupied and wild. It did not appear that Cooke or his successors, or Foster ever procured any license or permission from any one to erect or keep up said dam or that they ever acknowledged any title in any one, nor was there any evidence of what right they claimed to keep up said dam except what may be legally inferred from their continued use and occupation of it for this period of time. The town of Wheelock was chartered to Dartmouth College. The defendant John Garfield purchased the lot on which the outlet of said pond is situated in the spring of 1850, and entered into possession of it in June, 1850, and the other defendants about the same time purchased and entered into possession of other lots bordering on the pond.

The defendants purchased their lands of one Loomis, and it was conceded that the title of Loomis was derived from the college, but when the college parted with the title did not appear. On the border of the pond is a considerable quantity of low flat land, which is flowed and injured by raising the water of the pond three feet above

its natural level, and some of this flat land is included in the lots of each of the defendants. In 1850 or 1851 Foster sold and conveyed his mill to one Rufus W. Smith who went immediately into possession of it, and occupied it for about two years, when he sold and conveyed the mill to the plaintiff who went into possession and has owned and occupied it ever since. About the time Smith purchased the mill, the dam or a portion of it had been carried out by the water. John Garfield, one of the defendants, testified as follows in relation to the rebuilding of the dam by Smith, and subsequently by the plaintiff, and the court found the facts to be as testified by him: "Smith, who owned the mill, came to me and wanted to buy the privilege of rebuilding the old dam. I refused to sell, but told him he might rebuild the dam, but when it became a damage to me he must remove it. He said that was all he wanted, and that before he began to rebuild it he would put the agreement in writing. I had not then cleared to the pond. Smith continued to occupy the mill two or three years and then sold to Mr. Perrin. Six years ago last October a freshet washed out the dam Smith had built. Perrin came to me for privilege to repair the old dam. I told him he might have the same privilege Smith had, with one exception, that he must draw the pond down the 1st of June and keep it down till after haying, so I could cut the grass on the pond. He lived up to the agreement for two years. He then claimed to hold by possession, and when he came on to repair the dam, I forbid him, so as to hold my claim on Loomis."

On the 27th of November, 1861, the defendants removed the flume and enough of the dam to allow the water in the pond to sink to its natural level and it has so remained ever since. The effect of this was to make the plaintiff's mill unable to run for most of the time since, and if the plaintiff cannot avail himself of the water of the pond by raising it as before, to render his mill nearly valueless.

Upon the above facts the court, *pro forma*, adjudged that the plaintiff was entitled to recover,—to which the defendants excepted.

Peck & Colby and ——— *Cree*, for the defendants, maintained that the character of Foster's use and occupancy is not such as to give title. It is not found to have been with claim of right, but

simply *possession unexplained.* The affirmative is on the plaintiff to show title and he must couple the proof of occupancy with proof that it was under some claim of title. *Sargent* v. *Ballard*, 9 Pick. 254.

The possession must be *per patientiam domini.* The owner of the servient estate must have knowledge of it. *Hapgood* v. *Burt*, 4 Vt. 160; *Jackson* v. *Sellick*, 8 Johns. 202; 1 Ind. 129; 1 Hill Ab. 28; 2 *ib.* 52; Gale & W. on Easements, 75; *Gray* v. *Bond*, 2 Brad. & B. 670; *Betha* v. *Turner*, 1 Greenl. 115; *Wilson* v. *Storer*, 9 S. & R. 43.

From such entry by a naked trespasser no ouster of the true owner is presumed. Hence no right of action accrues to the owner and the statute bar does not begin to run. *Prop. Society* v. *Pawlet*, 4 Peters.

The mere right to erect a dam is in its nature temporary and expires with the decay of the dam, and its exercise is no evidence of claim of permanent right. *Hepburn* v. *Mcdonell*, 17 S. & R. 383.

Foster's right was never conveyed to the plaintiff. It was not appurtenant. And was not *claimed* by the plaintiff's grantor, Smith.

The right became extinct by the act of the plaintiff and his grantee in accepting a conditional privilege to build and maintain the dam after it was lost. 2 Hill Ab. 54; Gale & W. 265 & n.; 3 Kent's Com; *Williams* v. *Watkins*, 3 Peters 52; *Greeno* v. *Munson*, 9 Vt. 40.

It is only by analogy to statute of limitation that incorporeal rights are acquired. But the analogy is wanting in the case of Dartmouth College. And see *Prop. Society* v. *Pawlet*, 4 Peters 505; *David* v. *North*, 11 East, 372.

B. N. Davis, for the plaintiff, cited to the point that long continued possession affords presumptive evidence of title. *University of Vermont* v. *Reynolds*, 3 Vt. 558; *Knights* v. *Heaton*, 22 Vt. 480; 3 Starkie Ev. 915; *Johnson* v. *Ireland*, 11 East, 279; *Townsend* v. *Downer's Estate*, 32 Vt. 205; *Hazard* v. *Martin*, 2 Vt. 77; *Doolittle* v. *Holton*, 28 Vt. 819; *Sellick* v. *Starr*, 5 Vt. 255; *Ricord* v. *Williams*, 7 Wheat. 59.

This presumption arises after fifteen years uninterrupted enjoyment

in analogy to the statute of limitations. *Shumway* v. *Simons*, 1 Vt. 53; Angel on Water Courses, p. 213, §§ 203, 204.

To the point that the possession of Foster was open and notorious so as to put the owner of the land on his guard. Angell on Lim., §§ 391–2, 395, 398, 400.

The title to the easement being in Foster the deed of the mill carried with it all the necessary incidents for its use, and Smith took Foster's right and the plaintiff Smith's. Angel on Water Courses, § 153 *et seq.*

But it is said Smith asked leave of Garfield to rebuild the dam, and also that Perrin got the same license, thereby acknowledging the defendant's title.

This license so granted to Foster's grantees, might be a proper consideration for the jury or the triers of the facts to weigh in rebutting the presumption of a grant, and could only be weighed in that light and by giving judgment for the plaintiff the court below determined the evidence against the defendants, and it is not in the province of this court to say the fact was improperly found. Angel on Water Courses, § 168, 173; *Ricard* v. *Williams*, 7 Wheat. 106; *Jackson ex Dem. White* v. *Ann Cary*, 16 Johns. 303.

PECK, J. The defendants are sued for removing a dam and flume at the outlet of a natural pond in Wheelock. The dam and flume was situate on the land of the defendant John Garfield. He and the other defendants were at the time of the trespass complained of owners of land bordering on the pond, and the effect of the dam was to raise the water in the pond about three feet above its natural level and cause it to flow the low lands of the defendants to their injury.

The question is whether the plaintiff or those under whom he claims title had acquired an easement which justified him in keeping up the dam for the use of his mill situate about three-fourths of a mile below the dam, on a stream flowing from this pond. The plaintiff's title or right to keep up the dam rests on adverse enjoyment of the easement in connection with the use and occupancy of his mill. In order to make out such right it is necessary for the plaintiff to prove an uninterrupted adverse enjoyment of the easement for a pe-

riod of fifteen years by himself or his predecessors in title, or by both combined.

To make out the requisite period of time, the plaintiff can have no benefit from the user of Cooke, who erected the dam and kept it up from 1822 to 1832, when the mill Cooke erected in 1821 was burned, because the case shows that there was no privity between Foster, who erected the plaintiff's mill in 1833, and Cooke. But it appears that in 1833 Foster erected the mill now owned by the plaintiff on the same stream, about sixty rods above the site of Cooke's mill, on another lot in Goshen Gore, and went into the use and occupation of the dam and flume at the outlet in the same manner that Cooke had done, and that he kept up and used his mill for eighteen years, and during all the time kept up and used the dam and flume at the outlet of the pond in connection with it. In 1850 or 1851 Foster sold and conveyed the mill to Smith who occupied it for about two years, when he sold and conveyed it to the plaintiff who has owned and occupied it ever since. This shows an enjoyment of the easement a sufficient length of time, exclusive of the time that Cooke and his successors in title enjoyed it, to acquire a right coextensive with such enjoyment, if the user has the other legal characteristics necessary to gain the right. But it is insisted that the user was not adverse, or under a claim of right, and therefore no right was acquired. The leave granted by the defendant John Garfield to Smith, about the commencement of Smith's occupancy, is sufficient to destroy the adverse character of Smith's enjoyment; and the same is true as to the first two years of the plaintiff's enjoyment, up to the time the plaintiff asserted his right, and notified the defendant, as stated in the case. This interrupted the adverse enjoyment of the easement, and fifteen years did not elapse between the termination of Foster's user, and the notice by the plaintiff to John Garfield that he claimed the right in question. The question then must turn on the eighteen years enjoyment of the easement by Foster. It is claimed by the defendants' counsel that that was not adverse or under a claim of right. It is insisted that the leave asked by Smith about 1851, and by the plaintiff about two years after, and granted by John Garfield, destroys the adverse character of Foster's previous enjoyment of the easement. But if Foster had already acquired the right, this license

asked and granted has not the effect in law to defeat it. It is evidence tending to show that the previous user by Foster was not adverse or under a claim of right; but it is evident that the court did not so find the fact. This is evident from the statement in the exceptions, that "it did not appear that Cooke or his successors, or Foster, ever procured any license or permission from any one to erect or keep up the dam, or that they ever acknowledged any title in any one, nor was there any evidence of what right they claimed to keep up the dam, except what may be legally inferred from their continued use and occupancy of it for this period of time."

The general rule is that the enjoyment of an easement of this character is presumed to be adverse unless something appears to rebut that presumption. This is the general rule, when there is no express evidence that the user was accompanied by a claim of right, and no express evidence of a disclaimer of the right by the party enjoying the easement. There are some cases where the user is of such a character, and the circumstances attending it are such, as to show that it was a mere privilege enjoyed by leave of the proprietor of the servient tenement, express or implied, and not adverse. These cases are exceptions to the general rule, and peculiar in their character. This case comes within the rule and not within the exception. The fact that Foster incurred the expense of erecting the mill which, as the case shows, was almost worthless without this easement, tends strongly to show that he either had, or claimed the right, to the easement, or intended to enjoy it in defiance of the owner of the servient tenement. The court were warranted by the evidence in finding that the user of Foster was adverse, and it must be intended that they did so find, as this fact is necessary to warrant the judgment they rendered.

It is insisted that the case shows no notice to the owners of the servient tenement or lands, and that without proof of such notice no such acquiescence on the part of such owners is shown, as is necessary to the acquirement of an easement. The cases are rare and peculiar where proof of notice has been held necessary. The general current of the authorities is the other way. Whether they proceed upon the ground that notice is unnecessary, or on the ground that notice is to be presumed, it is not necessary in this case to de-

cide, because in this case, not only is there nothing to rebut the presumption of notice, but the circumstances are strong to show actual notice. The erection of a structure so obvious and palpable as a dam and flume, and the use of it such length of time by means of a gate at the outlet, to supply the mill, could hardly be otherwise than notorious in the vicinity, and would not be likely long to escape the observation of the proprietor of the lands on which they were situate and which were thereby injuriously affected. It is true the lands about that pond were wild and uncultivated till 1850, but this is not sufficient to rebut the presumption of notice. It is urged that Dartmouth College, the original grantees of the town of Wheelock, would not be likely to know of the erection of the dam, but it does not appear that the College owned the land at the time the dam was erected or while Foster or his successors were using it. The case shows that the defendants purchased their lands of Loomis about 1850, and that the title came originally from Dartmouth College; but the case further states that it did not appear when the College parted with the title. For aught that appears, Loomis or some prior purchaser in the chain of title from the College, owned the lands during the whole period of the user, and lived in the immediate vicinity. Under these circumstances the court were warranted in finding the fact of notice, and it must be taken that the court did so find, if notice is material. We have therefore no occasion to decide what the effect would be if it appeared that the proprietor of the servient tenement lived at a great distance and had no knowledge of the erection of the dam. We are not prepared to say that such proof would have defeated the plaintiff's right to the easement. It is sufficient to say that we have no occasion to decide the question.

It is claimed by the defendants that as the rule of law giving a party a right to an easement by fifteen years' adverse enjoyment, is adopted from analogy to the statute of limitations under which title to real estate is acquired by fifteen years adverse possession, the exceptions in the statute applicable to the latter apply equally to the former. This question it is unnecessary to decide, because a party who relies on an exception in the statute of limitations must show such facts as bring the case within the exception relied on. It appears by the charter of the town to Dartmouth College, that the land

was granted to a public charitable use, and such lands are excepted from the operation of the statute; but the College had the power of sale, and as already stated, the case shows that it did not appear at what time the College parted with the title. This exception in the statute did not apply to the land after the College sold and conveyed it. To entitle the defendants to the benefit of this exception it was incumbent on them to show that the College still owned the land at least during some portion of the fifteen years during which Foster was in the enjoyment of the easement, and by which user it is claimed by the plaintiff that he, Foster, acquired the right.

It is claimed also on the part of the defence that the easement is of such a character and so distant from the mill that it would not pass by a conveyance of the mill, and that therefore whatever right to the easement Foster had acquired, it did not pass by his deed of the mill to Smith, and by Smith's deed to the plaintiff. The case shows that the principal supply of water to run the mill was by means of this dam, and that by the privation of it the mill is rendered almost valueless. The general rule of law is, that whenever a party grants a thing he by implication grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing. This principle is especially applicable to water privileges in grants of mills and factories dependent on a flow of water for motive power. It is said this dam or easement is too far distant to pass by a conveyance of the mill. But the idea and definition of an easement incident to real estate granted, is a privilege off and beyond the local boundaries of the land or tenement conveyed. There is always a dominant and a servient tenement. It is not necessary that they should be contiguous to each other. The proximity of the one to the other is of little comparative importance in determining the question whether the easement passes by a conveyance of the dominant tenement. It depends rather upon the nature, character and purpose of the easement, its relation to the subject matter of the grant, its accustomed use in connection with it, and its necessity to the value, and to the beneficial and convenient use of the premises granted. There is a necessary connection between the mill and the stream and fountain of water which supply it, and which had long been used in connection with it. The

value of the mill depended mainly upon this privilege, so that without it the mill was almost worthless. The easement or privilege in question was necessary, if not indispensable to the use of the mill, was of great value to the grantee, and of no value apparently to the grantor after he had parted with the mill. Under these circumstances it is clear that the easement passed with the mill.

Judgment affirmed.

LEANDER HUTCHINS AND OTHERS v. GEORGE W. MOODY.

Evidence. Taxes.

Where a collector levied a tax on the land of H., prior to 1855, without levying on his body, (the law then in force requiring the collector to levy on the body before resorting to a sale of the land,) and testified in justification of the levy that H., prior thereto, had left the state with the apparent purpose of remaining abroad permanently, and that the collector made diligent inquiry and could not find that he had ever returned to Vermont, before he resorted to a levy on the land, it was *held*, that to rebut this proof evidence was admissible to show that the collector was informed and knew that H. lived in the state when he levied on the land, the question being whether the collector might with due diligence have arrested H. for the taxes.

THIS is an action of covenant broken. Plea, that the defendant has kept and performed his covenant. Trial by jury and verdict for the plaintiffs, Washington county, March Term, 1864, PECK, J., presiding.

This case has been twice before the supreme court on former occasions, and the cases are reported in the 30 Vt. 655, and 34 Vt. 433, where the facts are fully stated. It appeared that Oramel Howe held the title and was in possession of the premises in question, in Waterbury, on the first of April, 1853, and soon after sold the same to Wm. W. Wells, who sold to the defendant, Moody, and Moody deeded to the plaintiffs; that certain state, town and school taxes were assessed against Howe on the land in question, as set in the list of 1853; that Isaac C. Brown was first constable of Waterbury in the years 1853–4–5, and the tax bills for said taxes were delivered to him for collection, with warrants in due form; that Howe

and his wife left said premises and went to Pennsylvania, in May, 1853, and remained there until some time in the month of January, 1854, when they returned and took up their residence in Berkshire, in this state, and there remained until April, 1856, and then went into the state of Minnesota; that Howe left no personal property in Waterbury, and had none in the state, and was very poor.

Said Brown testified that after Howe left the state, he did not know of his having returned into this state until the time of the first trial in this suit; that before he instituted proceedings against said premises for the collection of said taxes, he made diligent search for personal property belonging to Howe, but could find none; that he made diligent inquiries after Howe himself, and up to the time of the first trial in this suit, he did not learn that Howe had returned to this state, but supposed that he had left and continued permanently out of the state. It appeared that after making said inquiries, and being satisfied that his only remedy for the collection of said taxes was by a sale of said land, Brown resorted to a sale of the land for this purpose.

The defendant offered to show that while Howe was in Berkshire, as above stated, and before and at the time Brown proceeded against the land, it was generally known in Waterbury that he resided there, and that Brown, who resided in Waterbury, also knew it, and was so told before leaving the proceedings in the town clerk's office, which was objected to by the plaintiffs, and excluded by the court,—to which the defendant excepted.

The only facts controverted before the jury was whether Brown might with due diligence have arrested Howe for the taxes, or collected them without resorting to the land, and this question was submitted to the jury, under instructions that if the jury found that he might, the plaintiffs could not recover.

The court further told the jury that if the officer knew while he had the rate-bills and warrants, before and at the time he proceeded against the land, that Howe lived in Berkshire, it would not prevent a recovery by the plaintiffs, but that if Howe was in Waterbury in 1854, and the officer by due diligence might have arrested him, or might have then collected the tax of him without proceeding against the land, the plaintiff could not recover.

Exceptions were also taken to the charge and ruling of the court in other respects, but not material to be stated.

Dillingham & Durant, for the defendant.

O. H. Smith, for the plaintiffs.

ALDIS, J. In all the former trials and hearings of this case it has been held incumbent on the plaintiffs to show, that all the facts necessary to justify the collector in resorting to a sale of land for collection of the taxes existed, and all the statutory requisites to charge the land with the tax, have been complied with and observed by the officer in order to authorize the plaintiffs in paying the tax before sale.

The statute in force when these proceedings were had required the collector of taxes to levy the tax first upon the goods and chattels of the delinquent, and for want thereof to take his body and imprison him before resorting to a sale of his land. This statute was altered in 1855 by authorizing a levy upon land before taking the body. But as these proceedings were under the old law it was the duty of the officer to take the body, if the tax-payer was resident in the state, before selling the land.

To justify this resort to a sale of the land the plaintiffs showed that Howe left the state in May, 1853, for Pennsylvania, with the apparent purpose of permanently residing abroad, and that the collector made diligent inquiry and could not find that he had ever returned to Vermont; that believing he was a non-resident he proceeded according to the statute to charge the land with the tax, and did such acts as, pursuant to the decision in this case in the 34th Vermont Reports, were requisite to charge the land.

It is admitted in the case that Howe did in fact return to live in Berkshire, in this state, in January, 1854, and lived there till 1856. That fact alone would not make the act of the collector in proceeding to sell the land illegal, provided he had made such inquiry and with such result as is above stated. Hence the importance of proving that he had made diligent inquiry for Howe, and could not ascertain that he had returned to Vermont.

To rebut this proof the defendant offered to show that the collector was informed and in fact knew that Howe lived in Berkshire when he levied the tax on the land.

If this was true—then as the officer had the right to take Howe's body in Berkshire, (his authority for that purpose extending over the whole state,)—and as it was his duty to do so before levying on the land, the evidence should have been admitted. The charge of the court indicates that the court considered the authority of the constable in this respect was limited to his own town. But this was erroneous. See the former reports of this case in the 30th and 34th Vt. and the Comp. Stat. ch. 81, § 15.

It is claimed by the plaintiffs that the evidence was rejected upon the ground that it was offered out of time. This does not expressly so appear, and we are informed by the presiding judge who signed the bill of exceptions that this claim is mistaken.

In the exclusion of this evidence there was error. For this reason alone the judgment is reversed and the case remanded for a new trial.

SYLVESTER HENRY *v.* GILMAN HUNTLEY.

Evidence. Deposition.

The defendant, an officer, attached a quantity of bark as the property of one Blush, it being in his tan-yard. The plaintiff claimed the bark, and his evidence tended to show that he purchased it of A. and had it delivered at Blush's bark mill to be ground, and that Blush had no title or interest in it. The defendant claimed that Blush purchased the bark of A., and showed, under objection, by the brother of A., that the day A. finished drawing the bark, he, the witness, was at a store near the tannery and A. came from the direction of the tannery to the store and showed him a note for about $75. signed by said Blush and no one else. It appeared from other evidence that the price of said bark was about $75. and that the last of it was drawn about the time the witness testified to seeing the note. *Held*, that the testimony objected to was admissible.

Where the name of a magistrate by whom a deposition is to be taken is inserted in the citation, the party taking the deposition cannot have it taken by another magistrate.

TROVER for a quantity of hemlock bark. Plea, the general issue, and trial by jury, September Term, 1863, Washington County, PECK, J., presiding.

It appeared that the defendant as constable attached the bark on a writ of attachment in favor of C. C. Corse against V. R. Blush, August 21st, 1858, and afterwards, as such constable, sold it on an execution issued on a judgment recovered in that suit. The question litigated before the jury was whether the bark at the time of the attachment was the property of the plaintiff or the property of Blush. It appeared that at the time of the attachment it was in the tan-yard of said Blush, where he was carrying on the business of tanning, being piled up in said yard where it was piled the winter previous by the persons who drew it, and of whom it was purchased when so drawn. No question was made but that if Blush ever was the absolute owner of the bark it was so far in his possession as to have been attachable as the property of Blush at the time the defendant attached it.

The plaintiff claimed and introduced evidence tending to show that in the winter of 1857–8, in December or January, he purchased a portion of the bark of one S. B. Atherton, who thereupon delivered and piled it in Blush's tan-yard, by the plaintiff's directions; that the plaintiff and Atherton then measured it, and that he gave his note for it, which he on the same day at some little discount, took up. And as to the residue of the bark in question the plaintiff claimed, and his evidence tended to show, that he purchased and had it delivered and measured about the same time, in the same way, and then gave his note to the seller, one Riker, and paid it to him soon after. As to both lots of bark, as well as other bark, the plaintiff's evidence tended to show that he purchased it for the purpose of sending it to market, after procuring it ground at Blush's bark mill, at said tannery; that Blush had nothing to do with the purchase of it, and never had any title to or interest in it.

The defendant claimed and introduced evidence tending to show that Blush purchased the bark of Atherton and Riker, instead of the purchase being made by the plaintiff, and that Blush purchased it in his own right, and that the plaintiff had nothing to do with the purchase, and had no title to the property, except that as to the Riker bark the plaintiff signed the note given for it with Blush, and as his surety merely,—and that Blush paid a portion of the price, and that what the plaintiff paid he paid as surety for Blush.

In the course of the trial the defendant introduced one N. A. Atherton as a witness, the brother of S. B. Atherton, and offered to show by him that the day his brother finished drawing the bark to the tannery, he, the witness, was at a store in Waterbury, a few rods from said tannery, and S. B. Atherton, who it appeared has deceased, came from the direction of the tannery to the store, and showed him a note for about $75. signed by V. R. Blush and no one else, and told him that he sold his bark to Blush and took that note for it. This was objected to by the plaintiff's counsel, and the court admitted the witness to testify to what he saw, and excluded all that was told him. It appeared from other evidence that the price of the bark bought of S. B. Atherton was about $75. and the last of it was that drawn about the time the witness testified to seeing the note. To this ruling of the court the plaintiff excepted.

The defendant offered in evidence the deposition of V. R. Blush, taken in Kansas, to which the plaintiff objected, and introduced a copy of the notice served on him, left by the officer who served the notice, and showed that it was a true copy of the original notice issued, and that no other notice was ever issued or served for taking said deposition, and no other notice given to the plaintiff. The plaintiff objected to the deposition, on the ground that the notice to take the deposition before "*Judge Brockway*" is too indefinite and uncertain, not giving his full name and office, and also because the deposition was taken before another person and officer not named in the notice.

The court *pro forma* overruled the objection, and the deposition was read in evidence. To this ruling the plaintiff excepted. Verdict for the defendant.

L. Henry and *Wing & Lund*, for the plaintiff.

The testimony of Atherton was improperly admitted. It had no tendency to prove that the note was given to his brother for bark sold Blush. The evidence has as much tendency to prove that Blush borrowed money of the witness as that he sold him the bark. It is the most dangerous kind of testimony. If it has any tendency to prove the issue it is too remote to be admissible. *Swampscott Machine Co.* v. *Walker*, 2 N. H. 457.

The deposition of V. R. Blush was clearly inadmissible. *Fitts* v. *Whitney*, 32 Vt. 589.

Dillingham & Durant, for the defendant, maintained that A. N. Atherton's testimony was admissible. *Hill* v. *North*, 34 Vt. 616. The "time and place" of taking the deposition was given, which is all the statute requires. G. S. ch. 36, p. 556. If taken fairly it is admissible. See *Alexander* v. *Alexander*, 5 Barr. 277; *Trapnall* v. *State Bank*, 18 Ark. 53; *Williams* v. *Chadbourne*, 6 Cal. 559.

ALDIS, J. The evidence was clearly admissible. It was of facts which, when connected with the other evidence as to the amount and price of the bark and when and where sold, tended to show that Blush bought the bark. The declarations of Atherton were not admitted.

The statute, (G. S. 324, § 6,) directs, that the citation to the adverse party to attend the taking of a deposition shall state "the time and place of taking;" but is silent as to whether the name of the magistrate by whom the deposition is to be taken shall be inserted in it. The form of the citation, (G. S. p. 753,) supposes that the magistrate who is to take the deposition issues the notice, and says "to appear *before me*." The general practice in the state has been, we think, to insert the name of the magistrate in the notice; but it has not been the universal and uniform practice. We do not decide whether it is or is not necessary to insert the name. But we all agree, that when it is inserted as it is claimed to be in this case, the party taking the deposition is not at liberty to go to another magistrate to take the deposition. Such a practice would give great opportunity for unfairness and fraud. The adverse party knowing the character and ability of the magistrate might omit to attend and send interrogatories for him to put to the witness; and thus, if the deposition were taken before another, lose the opportunity of cross-examination.

Judgment reversed and case remanded.

ADMINISTRATOR OF S. SARGENT'S ESTATE, *de bonis non*, v. ADMINISTRATOR OF JOHN H. KIMBALL'S ESTATE.

Administrator's Bond. Contingent Claim.

If an administrator neglect while he lives to pay to the creditors of his testator's estate the amount found in his hands upon settlement of his administration account, and ordered by the probate court to be paid them, the claim for such amount against the administrator's estate is absolute and not contingent, and should therefore be prosecuted as such before the commissioners.

A contingent claim is one where the liability depends on some future event, which may or may not happen, and which therefore makes it wholly uncertain whether there ever will be a liability.

APPEAL from the probate court. It was agreed that the facts upon which the plaintiff relied in support of his case were as follows: John H. Kimball was appointed administrator of the estate of Stephen Sargent, and gave a bond in due form. Assets came into his hands belonging to said estate, and on settlement of his account in the probate court there was found in his hands the sum of $192.21, which said court ordered Kimball, as such administrator, to pay over *pro rata* among the creditors of said estate. It is claimed by the plaintiff that Kimball did not pay said dividend, but in part neglected so to do, and the plaintiff offered evidence tending to show that the same was unpaid as to certain of the creditors of said Sargent's estate.

John K. Kimball deceased in 1858. The plaintiff, administrator *de bonis non* of S. Sargent's estate, presented his petition to the probate court of Orleans district, on the 31st May, 1860, for an order to allow the bond of said Kimball, administrator as aforesaid, as a contingent claim against his estate, and the same was allowed.

At the Orleans county court, June Term, 1863, PECK, J., presiding, upon the foregoing facts the court decided that the claim was not a contingent claim, and that for that reason it could not be entertained and allowed by the probate court except through commissioners, and on this ground alone disallowed the claim and rendered judgment for the appellant to recover his costs. To this decision the appellee excepted.

B. F. Fifield, for the defendant, cited *Jones* v. *Cooper*, 2 Aik. 54.

Timothy P. Redfield, for the plaintiff.

POLAND, Ch. J. From the facts presented by the agreed case, it is evident that the sole purpose of this proceeding in the probate court, was to enforce payment from Kimball's estate of the amount he was ordered to pay to the creditors of Sargent's estate by the probate court in 1846.

Nothing appears but that the settlement of Kimball's account as administrator of Sargent, in 1846, included and covered all the assets of the estate that ever came to his hands. Upon that settlement an order of distribution was made of the full amount in his hands, and he was ordered to pay the amount to the creditors, being twenty-one cents on the dollar to each. It is claimed that some of these creditors were never paid by Kimball this dividend, and it is upon this ground alone that the new representative of Sargent's estate presented Kimball's administration bond for allowance by the probate court as a contingent claim.

The only question presented is, whether in this view, and as a security for the payment of these creditors, Kimball's bond was a contingent claim, and properly allowed as such by the probate court. Under our system of settling the estates of deceased persons, all debts and claims of every sort, payable, or to become payable, absolutely, are required to be presented to the special tribunal provided by law for their adjudication, and if not there presented are barred. No uncertainty in relation to the amount due, or whether anything is due upon what is claimed to be an absolute debt against an estate, makes a case of a contingent claim within the meaning of the statute. A contingent claim is where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability.

The statute provides that after a decree by the probate court ordering a distribution of assets to the creditors, and the time fixed for payment has expired, the administrator shall be personally liable to the creditors for the amount so ordered to be paid, *as for his own debt*, and also that he shall be liable on his bond. In such case the creditor's debt becomes, (at his election at least,) an absolute debt against the administrator, enforcible against him personally and against his own property; and such failure to perform the order of the court, is not only a breach of the bond of the administrator in

terms, but is made so expressly by the statute. If the administrator is alive, and a creditor desires to enforce the payment of his debt by the administrator by a suit on his bond, the statute provides the mode of proceeding, by a suit in the name of the probate court, to whom the bond is given as a public trustee, for the benefit of all persons interested in any manner in the proper and faithful administration of the estate. But after a decree of distribution, the rights of the creditors are essentially several; any one can sue the administrator for his debt alone, and any one can prosecute on the bond. If the administrator has deceased, and the creditor wishes to pursue his remedy against his estate, there would seem never any necessity of resorting to the bond for that purpose, as the claim may be presented to the commissioners, and allowed by them, as it might have been sued for, and recovered in the life of the administrator, as his own debt. But if it were necessary to pursue the remedy on the bond for a breach, there is as little difficulty. If the condition of the bond has been broken, so that a suit could have been maintained in the lifetime of the administrator, it is equally a proper claim to be adjudicated by the commissioners on his estate. The same course of proceeding provided by statute in actions on probate bonds, cannot of course be followed, but this presents no difficulty. There are no forms of proceeding before commissioners, no declaration or pleadings are required, they are to allow all just debts and claims, no matter in what form they exist.

It is perfectly manifest that no claim could be more absolute against Kimball's estate than the claim of these creditors; and that the proper tribunal before whom to prosecute it was the commissioners on his estate. The fact that disputes existed between Kimball and some of them as to whether he had paid their debts, made the claim no more contingent than would a similar controversy with a man who held a note against him. Whether Kimball paid each of these creditors as ordered, was never a question to be settled between them by the probate court, but by whatever legal tribunal the creditor might resort to for the purpose of enforcing payment, if refused.

The plaintiff's counsel seem to understand that the amount in Kimball's hands in 1846, and ordered to be distributed to creditors,

if not paid by Kimball to the creditors, should now be paid over by Kimball's estate to the new administrator; that a settlement is now necessary in the probate court, to show how much Kimball paid to the creditors, and how much remains unpaid.

But when by decree of the probate court, the sum in Kimball's hands was decreed to be paid in several sums, to the creditors, the right to that amount became vested in such creditors, the administrator became personally bound for the payment of it; the new administrator was in no way responsible for it, nor entitled to the possession or control of it.

It is difficult for us to see what right this new administrator has to represent the creditors in any prosecution of their right under said order of distribution, whereby their rights to the extent of the sum ordered to be paid, became several and personal against Kimball himself; but this is a question not raised, or necessary to be decided.

This claim in behalf of the creditors of Sargent's estate against the estate of Kimball, was clearly absolute, and not contingent, and should therefore have been prosecuted as such before the commissioners, and was improperly allowed as a contingent claim by the probate court.

We can imagine a state of facts where it might be proper for the probate court to allow the bond of an administrator, as a contingent claim against his estate, in favor of his successor in the administration, but the facts relied on in the case presented, make no proper ground for it here, and the great lapse of time since the decease of Sargent, render it in the highest degree improbable they can exist.

The judgment of the county court is affirmed, with costs in this court, and the same is ordered to be certified to the probate court.

HORACE STRICKLAND AND OTHERS *v.* GEORGE W. PRICHARD AND OTHERS.

[IN CHANCERY.]

Associations. Free Masons.

"The Mount Lebanon Royal Arch Chapter" of Free Masons, in 1836, disposed of all their real and personal property, consisting of their hall, furniture and equipment, pursuant to a vote of the Chapter, and for twenty-three years held no meetings, elected no officers, performed no acts required by its laws and rules, and ceased to have any visible sign of existence. *Held*, that the legal existence of the Chapter was gone, and that it was beyond the power of the State Chapter to restore it to life so as to preserve for it a continued existence from 1836.

A rule of the association that officers elected should hold their offices till others were elected, could not operate in a case of this kind to preserve its legal existence.

APPEAL from the court of chancery, Orange County, January Term, 1863, PECK, Chancellor. The substance of the bill, and the material facts in the case are sufficiently detailed in the opinion of the court.

Peck & Colby, for the defendants.

Paul Dillingham, *A. M. Dickey* and *C. W. Clarke*, for the orators.

POLAND, Ch. J. The orators are the members of and constitute the "Mount Lebanon Royal Arch Chapter number thirteen," a masonic body or fraternity located at Bradford. They seek to recover by this suit a fund of between four and five hundred dollars from the trustees of the Bradford Academy.

From 1815 to 1836 there was an association or society of Freemasons located at Bradford, called the "Mount Lebanon Royal Arch Chapter number seven," composed of persons living in Bradford and vicinity.

On the 23d of February, 1836, this chapter voted to dispose of the real and personal property belonging to it, being their Masonic hall and the furniture and equipment of the order. On the 14th day of June, 1836, the chapter voted "that $150. of the avails of the funds of the lodge and said property be placed in the hands of the trustees of Thetford Academy, the interest of which to be appropriated by them for the benefit of said Academy, and the principal to be returned by said trustees when called for by this institution, and the remainder

to be placed in the hands of the trustees of Bradford Academy in like manner. Under this vote the sum before mentioned went into the hands of the trustees of Bradford Academy, the interest of which has been appropriated by them to the use of their institution, and the principal they have refused to pay over on the call of the orators. After the meeting of June 14th, 1836, at which said vote was passed, no meetings were held by said chapter, and no action had as an association or society, until the year 1859. At the annual session of the State Royal Arch Chapter in August, 1859, a petition was presented from certain persons who were members of said Mount Lebanon Chapter, praying for a renewal of their charter. This petition was referred to a committee who reported in favor of granting a renewal of said charter, upon payment of the regular fees for a new charter, and the report of the committee was adopted. Subsequently however at the same meeting this vote was rescinded, as it appeared to conflict with a general regulation adopted in 1850.

It is a matter of general history, as well as of proof in this case, that there was a general suspension of the exercise of their usual functions by all Masonic bodies in this state for many years succeeding the political excitement upon that subject, and the legislation adverse to masonry, which grew out of it. The State Royal Arch Chapter held no meetings from 1834 to 1849. In 1849 the State Royal Arch Chapter was reorganized, but it seems to have been doubted whether it really possessed legal vitality in itself, and it appears to have been done under a dispensation obtained from the Grand Royal Arch Chapter of the United States. In 1850 a set of general regulations were adopted applicable to the state of things existing after this long Masonic interregnum. One of these general regulations provided that subordinate chapters, theretofore chartered, should be entitled to have the same renewed on petition, by making application therefor at any time prior to the annual meeting in 1853. The Mount Lebanon Chapter had failed to comply within the time and for six years after. To avoid this difficulty it was proposed to amend the general rule so as to admit the granting a renewal to Mount Lebanon Chapter, but for no other purpose, and it was so done.

The avowed purpose in the petition for renewal and in the proceedings had upon it, was to keep up such a legal successorship as would enable the revived institution to recall the money parted with under said vote. Under this vote a new charter was issued to the Mount Lebanon Royal Arch Chapter number thirteen, and upon its face is wholly a new and original charter. Upon it however is endorsed a certificate by the Grand Secretary, that the charter is issued as a renewal of their original charter which is lost. The first meeting of the Mount Lebanon Chapter under this new or renewed charter was in 1860, and since that time several new members have been added to the chapter, who are also orators in this bill. The defendants resist a decree in favor of the orators for the repayment of this money, upon two grounds. First, that the institution of Freemasonry, (of which order or fraternity, the orators are an associated body in their Masonic character,) and its objects, practices and organizations are repugnant to, and contrary to the public policy and legislation of this state, and that therefore the court should not lend their aid to enable them to recover a sum of money to be applied to the uses and purposes of the organization.

Secondly, that the orators are not the same association or chapter who were the original owners of this money and parted with it to the defendants; that the original association was by its own acts, and the long cessation of any action required by its own laws and rules, actually dissolved and destroyed, and that the existing chapter though composed in part of the same members, and bearing the same name, is in reality a new organization, and has no legal title to succeed to, or claim the rights belonging to the first.

We do not find it necessary to decide the question raised by this first named ground of defence. It is a matter of public history that there was a period of some years, in this state, when among its citizens there was a very general distrust of, and hostility to the institution of Freemasonry, and this sentiment became the leading element of the dominant political party in the state. During the ascendency of this party, all the Masonic charters which had ever been granted by the legislature of this state were repealed, and a law was passed prohibiting the administration of extra judicial oaths. It was supposed by the party then in political power in the state, that they had

effectually destroyed the institution in this state, and for many years it ceased to have any apparent vitality. Whether the institution deserved all or any of the censure and unpopularity which it then suffered, we have now but insufficient means of knowing, and perhaps it would hardly be just to accept the legislative indications of those few years as establishing a general legal policy upon the subject.

The second objection we consider fatal to the right of the orators to the relief sought.

The orators claim to recover as an *association* or *society*, and not in their individual and personal rights. Many of the orators have but recently become members of the chapter, but they claim to be equally entitled with the others, because the right is that of the association. The orators not being a chartered corporation are obliged to sue in their own names instead of their corporate or charter name, but in substance they claim to act and have rights, in their associated character; that they are themselves, and their rights are of a *quasi* corporate character.

This brings us to the precise point in dispute; has the original Mount Lebanon Chapter been in continual existence to the present time; or was it in fact dissolved, and did it cease to have legal existence as an association or society? If it really ceased to exist, and became dissolved, it is not claimed that any new association, composed in part, or even of all the same members, and formed for the accomplishment of the same general purpose, can legally succeed to their rights or property. The rules and laws of the society provided for constant action by itself; it was required to make annual elections of its officers, and to hold meetings once in two months. For more than twenty-three years no meeting of the chapter was held for any purpose, and no officers were elected; it had no place of meeting, it was without property or effects, and was without visible sign of existence. Now if such a society or association, can be ended or dissolved by ceasing to act, and perform its ordinary functions and duties, provided for by its own laws and rules, it seems to us this one became so. For a period of time much longer than is required for any legal prescription in this state, or for the loss of any right by abandonment, or *non user*, this society was without sign of life or existence. That such an association might become dissolved

by an entire failure to act as such for a sufficient length of time, was not denied in the argument, and could not be successfully. If the time in the present case was not enough, we can hardly imagine what would be sufficient.

But it is said that although the rules of the society required annual elections of officers, they also provided that the officers elected should hold their offices till others were elected, and that this society was therefore in existence because it had officers duly elected and living. But the question of dissolution by lapse of time, could hardly be seriously affected by the existence of officers who did no acts and performed no duties as such.

But this provision for officers holding till others were elected, was evidently for the mere purpose of saving the regular existence of the association in case of accidental failure to elect at the required time, and it never was in fact, and never was intended, to be relied on as a provision for immortality, for any period of time after the association should in fact cease to exist.

It is claimed too that the several members of the chapter when they voted to sell their building, which was their place of meeting and deposit of their records and furniture, and also their clothing and equipment, and thereby disabled themselves from performing the various duties and ceremonies devolving on them as members of the order, intended not to disband or dissolve their society, but to keep that in life, ready to resume labor at any moment when public sentiment should seem more favorable to the order.

It is not perhaps very material to enquire what views any individual member of the society might entertain on that subject. It is undoubtedly true that many of the members of this chapter and others were warmly attached to the institution, and had some indefinite hope, that it would some day revive and flourish again, while others less devoted felt no such anxiety. But we cannot believe that any of the members of this chapter, at the time of the vote alluded to, had any serious intent or expectation of keeping their organization on foot, with a view to again set it in motion. At that time it was the general belief that the order would never again be revived in the state. The state organizations had ceased to act; charters granted to any masonic institutions by this state were repealed; the

right to administer oaths to members, which had before that time been universally used, was prohibited.

Under these circumstances it would be almost singular that the members of this chapter should have designed to have kept up their organization and existence.

Their acts seem to be much more in accordance with a design to disband and dissolve than to preserve and maintain their society organization. They by sale of their building and the furniture and clothing of their order, disabled themselves from performing the functions of their order, and abandoned all attempt to keep up their organization by the election of officers, holding meetings, or performing any duties enjoined by the code of the institution, and this state of non-existence continued for the period of twenty-three years. Even after the revival of the institution in the state and a regulation adopted for the reorganization of subordinate chapters, this one allowed years to elapse without conforming to it, or asking to be reinstated. The course of proceeding adopted for the purpose of renewing this chapter in the state chapter, seems to evince a painful consciousness that the attempt was that of restoring the dead to life.

We have no occasion to doubt but that the course adopted was sufficient to create the orators a valid subordinate chapter, but we are satisfied that the legal existence of the old Mount Lebanon Chapter was already gone, and that it was beyond the power of the state chapter to restore it to life so as to preserve for it a continued existence from 1836.

The decree of the chancellor is therefore reversed, and the case remanded with directions to dismiss the orators' bill with costs to the defendants.

O. P. Wakefield v. Connecticut and Passumpsic Rivers Railroad Company.

Railroad.

The statute, § 55, ch. 28, G. S., requiring the bell on locomotive engines to be rung or the whistle blown for a certain distance at crossings, imposes a duty on railroad companies, not only in reference to persons approaching or in the act of passing the crossing, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing train.

There might be cases where the company would be excused from complying with the statute, but in case of injury by reason of such omission, the company must show that it was reasonable and prudent.

Action on the case. Plea, the general issue, and trial by jury, Caledonia county, June Term, 1861, Poland, Ch. J., presiding. The plaintiff's evidence tended to prove that on the 16th day of August, 1860, he started from his home in Lyndon with four horses, intending to drive them to Boston for market. His horses were harnessed two abreast to a spring-board wagon. Just south of the village of McIndoes Falls, in Barnet, the highway crosses the railroad of the defendants from the west to the east side, and then runs parallel and quite near the railroad for a considerable distance. The river is near the highway on the east side, and the falls in the river at this place make considerable noise. For some part of the way for one hundred rods south of the crossing, the railroad is in a shallow cut, but not so deep but that a train of cars can be seen from any point in the highway in that distance. The plaintiff drove over the crossing, and had driven about thirty-five rods south, when a train of freight cars came over the railroad from the south, and was within five or six rods of the plaintiff's team when first discovered by himself and his horses. The forward pair of horses were greatly frightened, and instantly turned back and started with such force as to break their fastenings to the other horses, and ran northward toward the crossing at the top of their speed. Just about the time the train was opposite the plaintiff, in the highway, and just as the plaintiff's horses broke away the engineer sounded the whistle and the train continued forward and over the crossing, and while passing the crossing the horses reached it and ran against some part of the

train, whereby they were badly cut and bruised and the harnesses broken and injured. The plaintiff also claimed that by the sudden movement and jerking of his horses when they broke away, one of his thumbs was badly injured. The plaintiff's evidence tended to prove that no bell was rung or whistle was sounded on said train at the distance of eighty rods from said crossing, nor until after the horses had broken away, and that he had no notice of the approach of the train, nor had his horses, until within five or six rods of the train, and that his horses were frightened and broke away so suddenly that he could not control or manage them, but that if the whistle had been sounded eighty rods from the crossing, he should have had notice of the approach of the cars in season to have secured his horses, or at least to have maintained such control of them as to have prevented their getting away from him or upon the crossing.

The defendants gave evidence tending to prove that the usual place of commencing to sound the whistle was ninety-one rods south of the crossing, and that when the engine approached that place the engineer raised his hand for the purpose of sounding the whistle, but at that moment saw the plaintiff and his horses on the highway, some fifty rods distant, and that plaintiff's horses appeared to be frightened by the appoach of the cars, and fearing that the sound of the whistle would increase their fright and perhaps add to the danger, he omitted to sound the whistle until the engine had passed the plaintiff, and was about against the horses who were moving towards the crossing, when thinking that the sound of the whistle might cause them to turn or change direction so they would not go upon the crossing, the whistle was then sounded for that purpose; that at the rate the train was running, it appeared that the horses would reach the crossing at about the same moment with the engine, and therefore the engineer increased the speed of the train, and succeeded in getting upon the crossing before the horses, so that the horses struck the sixth car from the engine.

The defendants' counsel claimed that as the plaintiff had already passed the crossing, before the train came within eighty rods of it, and was not after that travelling toward or intending to pass the crossing, the omission to sound the whistle was not a neglect for

which the defendants could be made liable to the plaintiff, even if he suffered a loss by it. And also, that if the engineer omitted to sound the whistle because the plaintiff's horses appeared to be frightened by the train, and because he feared the whistle would frighten them more, and that as to the plaintiff this was a prudent and reasonable course of conduct, the defendants are not liable to the plaintiff for such omission.

The court declined so to charge, but told the jury that though the general purpose of the statute requiring a bell to be rung or a whistle to be sounded eighty rods from every crossing, undoubtedly was to give warning to travellers approaching or upon the crossings, that they might keep out of the way of the train, still if their omission to perform this legal duty really caused the damage the plaintiff sustained, they would be liable therefor, though caused in the manner this was.

And also, that if they found that the omission to sound the whistle at the required distance really caused the injuries the plaintiff sustained, the defendants would be liable therefor, though such omission was for the reason the defendants claimed, and though as to the plaintiff such omission was then apparently prudent and for his benefit. The defendant excepted to the charge, and to the omission to charge as requested. Verdict for the plaintiff.

B. N. Davis and *T. P. Redfield*, for the defendants.

The duty created by statute was due to a particular *class*, to wit., travellers approaching or upon the crossing, that they may be on their guard. G. S. § 55, p. 228.

Any traveller within this class is entitled to the duty towards him, —if not within the class to be thus protected, then the duty is not due him and he cannot claim its protection. *O'Donnel* v. *The Prov. & Worc. R. R.*, 6 R. I. 211; see also *Shaw* v. *B. & W. R. R. Co.*, 8 Gray, 46; *Galena & Ch. W. R. R. Co.* v. *Jacobs*, 20 Ill. 478; *Ricketts* v. *East & West India Dock Co.*, 74 E. C. L. 160; *Rice* v. *Montpelier*, 19 Vt. 470; *Hyde* v. *Jamaica*, 27 Vt. 444; *Jackson* v. *Rutland & Burlington R. R. Co.*, 25 Vt. 150.

There was error in charging that if the omission to sound caused the injury the plaintiff might recover, though such omission was reasonable and prudent, and apparently for the plaintiff's benefit.

The plaintiff must show that the direct and natural tendency of the omission was to cause the injury.

G. C. & G. W. Cahoon and *Peck & Fifield*, for the plaintiff.

The statute imposes the absolute duty of ringing the bell or blowing the whistle at eighty rods from the crossing. The scope of the statute can best be ascertained by seeking for the evil which it was intended to cure. That evil was the *danger of collision* at the crossing. Every case, therefore, in which there is or can be danger of collision at the crossing is within the statute. The defendants insist if they owe this duty to those who have passed the crossing, they owe it to persons travelling a highway parallel to the track, though not crossing it. The falacy of this argument is this, as to such persons there is no danger of collision. If there is such danger then they are within the statute, otherwise not. The defendants insist that though they did not ring their bell or blow their whistle, still they acted prudently in this case, and are therefore excused. But to act prudently was simply a common law duty which they were under before the passage of the statute. If they are under no greater duty now, then the statute is repealed. The true theory is this: the statute has imposed a new duty in view of the great danger at crossings, and the defendants are now under both the statutory and common law duty. To ring their bell and act prudently besides. And cited to the point that the question of negligence is one of fact, Red. on Railw., p. 393, § 2, and cases there cited; *Trow* v. *Vt. C. R. R. Co.*, 24 Vt. 495, and cases there cited; also see upon point of the defendants' liability, *Sheldon* v. *Fairfax*, 21 Vt. 102; *Griffin* v. *Farwell*, 20 Vt. 151; *Willard* v. *Newbury*, 22 Vt. 458; *Cassedy* v. *Stockbridge*, 21 Vt. 391.

Barrett, J. By section 55, ch. 28, of the General Statutes, it is required that, on every locomotive engine, the bell shall be rung, or the steam whistle blown, at least eighty rods from the place where the railroad shall pass any road or street on the same grade, and the ringing or blowing shall be continued until the engine shall have passed such crossing.

Two questions are made in this case under this provision of the statute: 1st, whether the plaintiff, having passed the crossing, and got some thirty-five rods from it, on his way, before the engine ar-

rived at the place prescribed, may insist upon having the bell rung or whistle blown, as upon a duty due to himself. It seems plain that the purpose of the law is to secure as much safety as could be done by notice of the approach of an engine, against accidents at and by reason of such crossing. While such accidents are, in the main, likely to happen to persons approaching, and about passing such crossing, yet they are not confined to such persons. And we think it would be an unwarrantable restriction of this provision of the statute, to hold that the duty thereby imposed has reference only to persons approaching, or in the act of passing the crossing. In our judgment that duty exists in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing of engines at that place.

This case presents a rare and extreme instance of alleged injury resulting from the failure to blow the whistle; and upon the evidence stated in the bill of exceptions, the connection of such failure with what then happened to the plaintiff and his team seems very slight and conjectural. Still, we do not feel warranted in holding that some connection, in the character of cause and effect, did not exist; or, that the plaintiff may not hold the railroad company responsible for any injury caused to him by an unwarrantable omission to ring the bell or blow the whistle in this instance.

The other question is, whether, by force of that provision of the statute, a railroad company is liable, in all cases, for injury that may happen by reason of an omission to ring the bell or blow the whistle within the prescribed limits.

In section 55, the requirement is affirmative and unconditional. But in section 56 it is enacted, that if any railroad corporation shall unreasonably neglect or refuse to comply with the requisitions of the preceding section, they shall forfeit, for every such neglect or refusal, a sum not exceeding two thousand dollars. The corporation could not be subjected to that penalty unless such neglect or refusal should be shown to be *unreasonable*. This clearly implies that in the contemplation of the law there may be cases in which such neglect or refusal would be *reasonable*; and if reasonable the penalty would not be incurred.

In a prosecution for the penalty, the burden would be upon the prosecutor of showing the neglect or refusal to have been unreasonable; and, upon first impression, it might seem that the rule, as to the liability of the corporation, is the same *civiliter* as *criminaliter*. But, on very full consideration, the court are unable to adopt that view.

At common law it would be the duty of the corporation to exercise all reasonable care in the running of engines, and in the general use of the railroad; and to adopt all proper precautions against accidents likely to happen by reason of the road; and the faulty neglect of the corporation in these respects would, when affirmatively shown, subject them to liability for injuries caused thereby. We think the provision of the 55th section was designed to operate more stringently in this respect than the common law; and while it was not designed to subject the corporation to civil liability, entirely regardless of the circumstances and occasion of the omission to ring the bell or blow the whistle, in all cases of injury caused by such omission, still it was designed to require, as the general rule, that the bell should be rung or the whistle blown in all cases; and, in case of injury by reason of an omission so to do, to impose the burden on the corporation of showing that such omission, in the exercise of a sound judgment by the engineer, in view of the condition of things as they existed at the time, was reasonable and prudent. When, therefore, in a case like the present, the plaintiff should show that the alleged injury was caused by such omission, it would not be necessary to his right of recovery that he should take the burden of showing affirmatively that such omission was unreasonable and imprudent; but it would rest upon the defendant, as matter of defence, to show that it was reasonable and prudent.

This seems to us to secure to individuals and to the public all the protection that is practicable to be afforded in this way, and all that the statute was designed to secure. It seems to us to be not reasonably supposable that the statute was designed to make the doing of those acts a matter of indispensable legal duty in all cases, and under all circumstances; for it is easy to conceive of cases, and they actually occur, in which the ringing of the bell or the blowing of the whistle would consummate, with disaster, the peril in which the

party was already placed,—disaster which might not have occurred, if the ringing or blowing had been omitted. In such a case it would certainly be, not only unreasonable, but sometimes, under existing circumstances, little short of murderous to ring or blow. It would be a case plainly contemplated by the statute as likely enough to occur; and this is manifested by the sec. 56, in providing as to the penalty.

In our opinion, therefore, the liability of the corporation should be left to stand upon this, viz: whether, in the judgment of the jury, upon all the evidence, the omission in the given case, in view of the actual condition of things at the time, was reasonable and prudent. This leaves the matter to be settled, not by the judgment of the person running the engine, but by the judgment of the jury, exercised upon the circumstances in which the engineer was placed at the time he withheld the ringing of the bell or the blowing of the whistle.

This holds the corporation and the engineer, not merely to the exercise of an honest good faith and intention, but to the exercise of reasonable judgment and prudence. It holds the corporation responsible for the competency, in this respect, of the engineers, and at the same time does not preclude the exercise of such judgment and prudence, with a view to relieving impending peril, and avoiding probable disaster to the imperilled party.

Upon the evidence set forth in the bill of exceptions, we think that, as to the subject matter of the second request, the defendants were entitled to a charge substantially conformable to the views of the court as above indicated.

The judgment is reversed, and the case remanded.

Samuel W. Cobb *v.* James Buswell.

Chattel Mortgage. Attachment. Conflict of Laws.

A debtor of the plaintiff, while the plaintiff was living in New Hampshire, where the debtor then lived, gave the plaintiff a chattel-mortgage of the property in suit, which was valid by the laws of New Hampshire without change of possession. The debtor then brought the property into Vermont with the consent of the plaintiff, and used it for some months, having the exclusive possession of the same, when his creditors in Vermont caused it to be attached, and the plaintiff brought this action of trespass against the attaching officer. *Held*, that the plaintiff's lien by virtue of his chattel-mortgage being good by the laws of New Hampshire, was equally valid in Vermont, and the plaintiff was entitled to recover.

Trespass for two horses, two team harnesses, and one two horse wagon. Plea, the general issue, with notice. Trial by jury, June Term, 1864, Orleans County, Poland, Ch. J., presiding.

The plaintiff read in evidence three mortgage deeds from Jefferson Wooster to himself, and produced the notes described therein, and proved that the same were unpaid, and that the property sued for was a part of the property described in the mortgage deeds. At the date of these deeds, the plaintiff and Jefferson Wooster were both residents of Hanover, New Hampshire, and both continued to reside there until after the taking of said property by the defendant, and the property was also in the possession of Wooster at Hanover, and so continued until the fall of 1862, when Wooster applied to the plaintiff to take said team to Barton, Vermont, to work on a railroad, and the plaintiff consented thereto. Accordingly about the 1st of September, 1862, Wooster took the team to Barton and worked with it on the railroad until April, 1863, when the same was taken by the defendant, a deputy sheriff, on writs of attachment in favor of Thomas O. May and others against Wooster, and sold on execution obtained in the suits in due form of law.

No question was made upon the proof but that all the facts hereinbefore stated as proved were true and fully proved.

The defendant also gave evidence tending to prove that Wooster, while at work on the railroad, told May and other persons of whom he wished to obtain credit, that he owned said team.

It was not claimed that any knowledge of these statements ever came to the plaintiff.

The defendant claimed that the property having been allowed by the plaintiff to be brought into this state, and kept here for so long a period by Wooster, made it subject to attachment upon his debts, especially such as were incurred here, while so having and using the property. But the court decided that upon the facts proved and conceded the plaintiff had made out a good title to recover against the defendant, and directed a verdict accordingly;—to which the defendant excepted.

Timothy P. Redfield, for the defendant.

The mortgage of a chattel in another state, without change of possession, and the use and possession remaining in the vendor or mortgagor in this state as the *apparent* owner is inoperative in this state as against a creditor of the mortgagor. *Skiff* v. *Solace*, 23 Vt. 279; *Taylor* v. *Boardman*, 25 Vt. 581.

The registry of such a mortgage in the state of New Hampshire is not *constructive notice*, as a personal chattel has no permanent *situs*.

The registry system as to *lands* which have a fixed *situs* insure safety to every purchaser; but not so with a personal chattel.

If the plaintiff who had a mortgage lien in his own state *suffers* the property to be removed by the general owner into this state, and to be used here by him in a permanent business for the *season*, as the ostensible owner, and where by law the creditor may attach and thus obtain a lien for his debt, he voluntarily takes upon himself the risk of such attachment. *Fletcher* v. *Howard*, 2 Aik. 117.

The question would have been the same had the debtor sold or pledged the property in this state—a mere question of priority of *lien*. See *Harrison* v. *Sherry*, 2 Curtis (U. S.) 267; *Lanfear* v. *Sumner*, 17 Mass. 112; *Lamb* v. *Durant*, 12 Mass. 54; *Wright* v. *Montgomery*, 8 Mich. 143.

C. Robinson, for the plaintiff.

The question as to whether a chattel mortgage executed in a neighboring state and in accordance with the laws of that state, will protect the property from attachment in this state where there has been no change of possession, in a suit against the mortgagor temporarily a resident here, has been fully discussed and decided in the case of *Jones* v. *Taylor*, 30 Vt. 42. See Story on Con. of Laws 326, 402; *Taylor* v. *Boardman*, 25 Vt. 581.

If Wooster claimed to May, the attaching creditor to own the team, without the knowledge or consent of the plaintiff, it could in no way affect the rights of the plaintiff under the mortgage. And the evidence tending to prove that Wooster before the taking of the property by the defendant told the said May and other persons of whom he wished to obtain credit, that he owned the team was irrelevant, excepting so far as it tended to impeach the testimony of Wooster.

PECK, J. The plaintiff claims title under three mortgages from Wooster to him. The defendant justifies the taking under writs of attachment and executions against Wooster. No question is made by the counsel for the plaintiff but that the mortgages were regularly executed and recorded according to the laws of New Hampshire, where the parties resided and where the property was then situated. Nor is any question made but that by the statute of New Hampshire the plaintiff might let the property remain in the possession and use of the mortgagor without subjecting it to attachment as the mortgagor's property. There having been no change of possession, the property would have been clearly attachable as the property of the mortgagor had the mortgagee acquired his title under our laws. The question is whether the bringing of the property into this state by the mortgagor under the circumstances stated in the exceptions, subjected it to attachment by his creditors, although not so liable under the laws of New Hampshire where the plaintiff acquired his title, and where the parties to the mortgages resided.

There is no doubt but that the right of a creditor to attach and levy upon the property of his debtor, as a general proposition, pertains to the remedy, and depends on the laws of the place where the property is found and attached. For instance, if a debtor's property of a certain kind and to a certain amount, exempt from attachment and levy by the laws of New Hampshire, is brought here, it is subject to attachment in this state, unless exempt by our laws. But whether property brought into this state by a debtor, is to be regarded as his property for the purposes of attachment and levy, or the property of a third person, is a different question. Where in cases like the present, a right is claimed to attach personal property as the property of the former owner on the ground of a non-compli-

ance with a rule of policy adopted to prevent fraud, and hold it against a purchaser or mortgagee who has acquired a title in another jurisdiction, perfect against the creditors of the vendor or mortgagor by the law of the place of the contract, where no such rule of policy prevails, more difficulty arises. The cases on this subject are not entirely harmonious. In determining which law shall govern, the domicil of the contracting parties at the time of the contract, the place of the contract and the *situs* of the property at the time of the contract, are all to be considered. It is sometimes said that personal property has no *situs*, and for some purposes it is true, or more properly, it is for some purposes immaterial; but for other purposes, and as applicable to questions of this character, the actual *situs* of the property is not to be disregarded. Much of the conflict in the decisions on this subject has arisen from the different effect different courts have given to these several considerations, where the place of the contract, the domicil of the parties to it, and the *situs* of the property have been not all in one jurisdiction at the time of the contract. But no such embarrassment arises in this case, because the domicil of the parties, the place of the contract and the *situs* of the property were all in New Hampshire when the mortgages were executed. The only thing that raises any question is the removal of the property into this state where a rule of policy prevails requiring a change of possession. The law of one state cannot by its own force operate in another state, but we can look at the laws of another state to see what rights a party has acquired under them. If the immunity from attachment at the suit of the creditors of Wooster in respect to this property, is a part of the contract, then it is clear that the defendant's attachment must give way to the plaintiff's title. But if this rule requiring or dispensing with a change of possession, is a mere rule of local policy by which a duty may or may not be super-added to the contract, and imposed upon the purchaser to take possession in order to protect the property from attachment, then our laws may apply if sound policy requires that it should be extended to cases like the present.

One ground on which it is urged by the defendant's counsel that our law ought to apply to this case is, that the attaching creditor is a citizen of this state. It is true we are not always bound to give

effect to a foreign law in a given class of cases, if by doing so it would be so far detrimental to our citizens generally as to contravene the general policy of the state; but it is immaterial whether in the particular case a citizen of our own state is a party, as the same rule ought to be applied to citizens of other states as to our own. It has been sometimes supposed that *Skiff* v. *Solace*, 23 Vt. 279, was decided partly on the ground that the attaching creditor was a citizen of this state; and there is an expression in the opinion given in that case that favors the idea of giving some peculiar protection to our own citizens. But it cannot be supposed that that was a controlling consideration in that decision, since the case shows that the mortgagee was also a citizen of this state. But however that may be, the idea of such preference in favor of our own citizens has been expressly repudiated in several later cases. *Taylor* v. *Boardman*, 25 Vt. 581; *Jones* v. *Taylor*, 30 Vt. 42. The plaintiff in this case cannot be deprived of any rights that he would otherwise have, from the fact that the defendant and the attaching creditor under whom he justifies, are citizens of this state, even if the attaching creditor is a citizen of this state as is claimed by the defendant's counsel.

On the other hand the decisions in this state settle the principle that this immunity from attachment is no part of the contract. This is expressly recognized and directly involved in *Rice & Danenbaum* v. *Courtis*, 32 Vt. 460. That case and *Hanford* v. *Paine & Trustee*, 32 Vt. 443, were argued and decided at the same term. In *Hanford* v. *Paine & Trustee* the decision was that a general assignment of personal property made in New York, where the parties to the contract resided, executed according to the laws of the state of New York, was valid and operative against a subsequent attachment here, even in relation to property permanently situated and invested in business in this state at the time of the assignment, although there was no compliance with our statute relating to such assignments. The court held that the assignment being valid in that state, was equally valid here to pass property situate here. The court held as matter of construction that our statute regulating assignments only applied to assignments made here, or by parties having their domicil here at the time. In that case no question arose as to change of possession, as the assignee had taken possession just before the attachment or trus-

tee process was served. But in the other case, *Rice & Dancnbaum* v. *Courtis*, which was like the other, except there had been no change of possession, the attaching creditor held the property against the title under the prior assignment. The court distinguished the two cases upon the ground that the requirement of a change of possession was no part of the contract, but a rule of local policy applicable to all property situate in this state at the time of the sale or transfer.

The question then arises, not whether the law of New Hampshire shall operate here, but whether our local rule of policy requiring a change of possession, shall be extended to transfers made in another state where the parties to the contract resided, and where the property was located at the time of the transfer, to defeat a title perfect by the laws of that state not only against the former owner, but against his creditors. To show that it does apply to such case the defendant's counsel refers to *Skiff* v. *Solace*, 23 Vt. 279. If that case is to be now regarded as law, to the extent indicated by the decision, it would seem to be decisive of this case for the defendant. But that case was questioned, if not in effect overruled, in *Taylor* v. *Boardman*, 25 Vt. In *Taylor* v. *Boardman*, at the time the mortgage was executed, two of the mortgagors and the mortgagee resided in Massachusetts, and the other mortgagor resided in this state, the mortgage was executed in Massachusetts where the law required no change of possession, the property was there situated, the mortgage was afterwards foreclosed in Massachusetts. Afterwards the mortgagor, without the consent of the mortgagee, brought the property into this state and sold it to the defendant who bought it for a valuable consideration without notice of any defect of title in the mortgagor. The court held that the defendant acquired no title against the title of the mortgagee. The court in the opinion alluded to some particulars in which the case differed from *Skiff* v. *Solace*, but it is evident that they considered that the two cases could hardly stand consistently with each other. *Jones* v. *Taylor*, 30 Vt. 42, decides that a chattel mortgage executed in New York by a citizen of that state where the property had its visible locality at the time of the execution of the mortgage, and valid against creditors by the laws of New York without a change of possession, will protect the property from attachment in this state at the suit of a creditor of the mort-

gagor resident here, though found here in the possession of the mortgagor. In deciding that case the court say that *Skiff* v. *Solace* has no sound basis upon which it can stand. It is treated as overruled. These two later cases we are disposed to adhere to, and they are decisive against the right of the attaching creditor in this case unless the distinction between those cases and the present one, relied on by the defendant's counsel, requires the application of a different principle. It is insisted that as the property in this case was brought into this state by the consent of the mortgagee, to remain and be used here by the mortgagor, if not permanently, yet for a considerable time, a different rule should govern the case.

It is true that in *Taylor* v. *Boardman* the case shows that the property was brought into this state without the knowledge or consent of the mortgagee, and in *Jones* v. *Taylor* the case is silent on this subject, and does not show by what means or by whose procurement the property was brought into this state, or how long it had remained here. But the principle decided in those cases is, that the rule of policy requiring a change of possession, applies to transfers made within this state, and to transfers of property situate in this state at the time of the transfer, and not to sales or mortgages like this, perfect by the laws of the place where made.

If this rule requiring a change of possession does not apply to such sales made out of the state, as held in these cases, it is immaterial at whose instance, or by whose consent, or for what purpose the property was afterwards brought into the state, or how long it had remained here after the sale or mortgage before the attachment. As Wooster never owned the property, absolutely in this state, and made no transfer of it here, no change of possession was necessary here to perfect the title against creditors, which was already complete by the laws of New Hampshire. It is evident that the court in *Rice & Danenbaum*, where they hold that a change of possession is necessary under a sale made abroad, if the property has its locality here at the time of the sale, did not intend to extend the sale further. This appears from the whole reasoning of the case; and in conclusion the court say, "it is true that out of comity we do not apply it so as to defeat rights acquired in other states as to property having its locality there. This would be to work fraud and injustice, and

offensively to divest rights acquired *bona fide* under the laws of a foreign state." The phrase, "having its locality there," must have reference to the time of the sale.

It is insisted that unless a change of possession is required in cases like this, that creditors may be misled, and that in this case the creditor was misled, by the possession remaining in the mortgagor, and by his representing the property as his. This may be true in some cases, but there are many cases where the same may be true and yet the apparent ownership yields to the actual title; as in cases where property was never owned but hired, by the one in possession, and cases of sheriffs' sales and conditional sales, where no change of possession is requisite.

The defendant's counsel refers to *Montgomery* v. *Wright*, 8 Mich. 143. That case differs somewhat from this. The case arose between a mortgagee under a mortgage executed in Canada, and an attaching creditor under a subsequent attachment in Michigan. The plaintiff resided in Michigan and owned and was in possession of the horse in question at Detroit. He afterwards removed into Canada and took the horse with him, and soon after executed the mortgage in Canada, under a statute similar to the New Hampshire statute. Afterwards, having resided in Canada about a year, he brought the horse to Detroit to be trained, and after the horse had been there about a month and a half, he was attached as the property of the mortgagor. I do not say that the fact that the mortgagor had previous to the mortgage, and so recently, been the absolute and notorious owner of the property in Michigan, accompanied by possession while he resided there, ought of itself to distinguish the case in principle from this, but it furnishes an argument, if not a sufficient reason, for requiring a change of possession in that case, that does not exist in this. But what is of more importance, the Canada statute required the mortgage to contain a particular description of the property, and the court decided on the authority of decisions of the Canadian courts, that the mortgage was void by the law of Canada as against creditors for want of a more particular description of the property. That point they held was decisive of the case. The court go on however and express an opinion that the attachment would still prevail if the mortgage had been valid by the

laws of Canada. The court refer to no authorities on this point, but the counsel for the attaching creditor cited *Skiff* v. *Solace*, 23 Vt. The later cases in this state on the subject were not referred to in that case. The case has much less weight than it would be entitled to, had the court held the mortgage executed in Canada, valid by the laws of Canada, so as necessarily to have presented the question, whether the law of Canada, or the law of Michigan, should govern the rights of the parties. But aside from this view of that case, we are disposed to adhere to the principles established by our own decisions made since the case of *Skiff* v. *Solace*.

Judgment affirmed.

OLIVER P. CHANDLER *v.* ISAAC DYER.

[IN CHANCERY.]

Mortgage. Attachment. Chancery. Parties.

An attachment upon land creates a specific lien thereon, and vests in the attaching creditor a right in equity to redeem the land, even before judgment and levy, from a prior incumbrance, in order to make his own claim beneficial or available to himself.

He is entitled to the same right of redemption as a mortgagee has; and if not joined as a party in a suit of foreclosure upon the same land, his right to redeem is not affected by the decree.

His payment of the prior mortgage incumbrance is not regarded as a voluntary payment, but the exercise of an equitable right,—and, as against the mortgagor and all holding under him, and subsequent to his, the creditor's, attachment, the effect of the redemption is not to extinguish the mortgage so redeemed, but to keep it alive as a subsisting lien upon the land, whether the creditor pursue his attachment lien or not.

The fact that the first and third incumbrance, the attachment being the second, were held by the same person, would not give him any greater rights than the holder of the third would have if he had not held the first.

BILL IN CHANCERY. The allegations and prayer of the bill are sufficiently set forth in the opinion of the court. The case was heard upon demurrer to the bill, at the December Term, 1862, Wind-

sor county, BARRETT, Chancellor, and the bill was dismissed,—from which decree the orator appealed.

Washburn & Marsh, for the orator.

The defendant held a mortgage of certain premises, dated March 3d, 1857, for $478. The plaintiff attached the equity of redemption March 26th, 1857. The defendant took a second mortgage, dated February 3d, 1858, to secure $4000., which covered all the land included in the first mortgage, except one lot. A decree of foreclosure was obtained by the defendant upon the first mortgage September 30th, 1858, and before the decree became absolute, the plaintiff paid to the clerk $591.40, September 26th, 1859, which was the amount then due upon it. The bill alleges that the payment was made by the plaintiff in good faith, for the purpose of redeeming the premises from the first mortgage, and protecting the plaintiff's lien under his attachment. The defendant received and still retains the money so paid by the plaintiff. The defendant obtained a decree of foreclosure upon his second mortgage, which became absolute September 30th, 1859, and he holds the premises under that decree. The plaintiff was not made defendant in either bill of foreclosure. The plaintiff obtained judgment, June Term, 1860, and execution was issued and levied upon other property of the mortgagor.

The plaintiff now claims that the defendant should repay the amount paid by him to redeem the premises from the first mortgage.

The plaintiff by his attachment acquired a lien upon the premises, which gave to him an equitable title, as specific, if not as extensive, as that of a purchaser. *Bigelow* v. *Topliff*, 25 Vt. 273; *Carter* v. *Champion*, 8 Conn. 549; *Braley* v. *French*, 28 Vt. 552. And for the purpose of protecting his lien, he was entitled to redeem the premises from the first mortgage. It is not essential to this right that he should have had an *interest in the land;* it is sufficient that he had a legal lien upon it. 2 Story's Eq. 291, 363; 4 Kent, 162. And he might redeem, though not party to the foreclosure. *Lyon* v. *Sanford*, 5 Conn. 544.

It is objected in reliance upon *Nichols* v. *Holgate*, 2 Aik. 138, and *Downer* v. *Fox*, 20 Vt. 392, that the plaintiff acquired by his attachment no interest in the land which the defendant was bound to notice, and that he could not have been made party to the bill of fore-

closure. The same doctrine prevails in Connecticut. *Lacy* v. *Tomlinson*, 5 Day, 77. Yet it is there held that the plaintiff might redeem. *Lyon* v. *Sanford*, 5 Conn. 344. And if he do redeem he cannot be held to be a mere volunteer, and if not, then he is subrogated to all the rights under the first mortgage. The defendant holding under the second mortgage, stands in the same relation to the plaintiff that he would have sustained if the first mortgagee had been a third person. He can claim no other or different rights, since the doctrine of tacking mortgages does not prevail in this State. The defendant is not now at liberty to deny the plaintiff's right to redeem. He has accepted the money paid for the purpose of redeeming the premises, and now claims to hold both money and land.

Converse & French, for the defendant.

The *attachment* did not authorize the orator to redeem in such a sense as to keep the mortgage on foot for his benefit, as he claims, unless he levied upon the equity within the time allowed by law. An attachment of real estate confers no interest in or right to the premises attached. 1 Wash. Dig. pl. 40, p. 266; *Braley* v. *French*, 28 Vt. 546; *Lacy et al.* v. *Tomlinson*, 5 Day, 77; 6 Day, 77. The *right, claim or lien*, or whatever it may be called, acquired or created by *simply attaching real estate*, is at least *inchoate, imperfect and incomplete.* It requires a legal judgment, execution and levy, in order to render the *right, claim* or *lien* complete. The courts have uniformly held it to be improper to make an attaching creditor a party to a bill to foreclose unless he has obtained judgment, taken execution, and levied it according to law. *Nichols* v. *Holgate*, 2 Aik. 138; *Downer* v. *Fox*, 20 Vt. 388; *Cheney* v. *Axtell*, 1 Wash. Dig. 266. Every person who has a *lien* upon real estate may redeem, and every person who has an *interest* or *lien* should be made parties to a bill to foreclose a prior mortgage. *Bullard* v. *Leach*, 27 Vt. 491; Sto. Eq. Pl. 176, § 193. There was not the slightest occasion for the orator moving in the matter, till he had perfected his lien by levy of execution. He expressly alleges he was not made a party to the bill of foreclosure. If he had been he would have been dismissed with costs. 2 Aik. 138; 20 Vt. 388.

The orator redeemed the first mortgage as an *attaching creditor*. By his neglecting to perfect his *lien* he lost all rights which might at-

tach to that character. He ceased to be such. He could claim no right as such. He *voluntarily* abandoned all rights and privileges under his attachment.

ALDIS, J. This case has been heard upon demurrer to the bill.

The bill states, 1st. That the Island Pond Lumber Company executed a mortgage of five lots of land in Brighton, to the defendant, Isaac Dyer, dated March 3, 1857, to secure $478. This was the first mortgage. 2d. The plaintiff, on the 27th June, 1857, attached the lands so mortgaged, in a suit against the Island Pond Lumber Company, to secure and collect a debt that company owed him of about $2100. This was the second lien upon the lands. 3d. The Island Pond Lumber Company, on the 3d February, 1858, executed another mortgage to Dyer to secure another debt due him of about $4000. This was the third lien upon the lands.

Dyer, on the 30th September, 1858, got a decree of foreclosure upon his first mortgage—the time of redemption to expire on the 30th September, 1859—the sum due being $552.64. He also got another decree, on the 30th September, 1858, to foreclose his last mortgage (being the third lien) by the 30th September, 1859, upon non-payment of $4290.96.

The plaintiff (Chandler) was not joined in either of these bills of foreclosure.

Chandler entered his suit, in which he had attached these lands, in court at the September Term, 1857, of Essex county, and in due course of law obtained judgment at the June Term, 1860, against the Island Pond Lumber Company for $2184.68, and costs.

As Dyer's decree of foreclosure upon his first mortgage (which was prior to Chandler's attachment) would expire on the 30th September, 1859, Chandler, in order to protect his interest by attachment in the mortgaged premises, on the 26th September, 1859, redeemed the first mortgage by paying to the clerk of the court, pursuant to the statute, the amount due on the decree. Dyer received of the clerk and holds the amount so paid. This was all done before Chandler got final judgment in his suit. When he finally got judgment, he levied his execution upon other lands of his debtor, and thus his lien upon these lands by the attachment was discharged. He now brings this bill against Dyer, who claims to hold these lands

by virtue of his decree obtained in foreclosing his last mortgage, (which was subsequent to Chandler's attachment), claiming that Dyer shall pay what he (Chandler) had to pay to redeem the first mortgage or be foreclosed.

I. The first question which arises in the case is whether Chandler, at the time he paid the money upon the decree made to foreclose the first mortgage, had by virtue of his attachment a right to redeem the lands by paying the amount due on the decree.

It is claimed on the part of the defendant that an attaching creditor of lands, before levy of his execution, has no right to redeem. The argument to sustain this view of his rights rests, 1st, upon the fact that the attachment is a proceeding *in invitum*, not resting upon an agreement of the owner of the equity to charge the land with the debt,—that the attaching creditor gets merely a privilege to charge the land by levying his execution—that he may never get a judgment,—that if he do it may be paid by the debtor, or may be levied upon other property or lands by the creditor; and 2d, that the cases of *Nichols* v. *Holgate*, 2 Aik. 138, and *Downer* v. *Fox*, 20 Vt. 392, have established the rule in this state that an attaching creditor of lands is not a proper party defendant to a bill of foreclosure, and that if he is joined as defendant he will be dismissed with his costs. It is urged as a necessary deduction from the doctrine of these cases that if he may not be joined it must be because he has no right to redeem.

The statute of our state which authorises the attachment of lands upon mesne process, provides that they shall be held to respond the judgment which may be recovered in the suit upon which they are attached for five calendar months after judgment. It has always been held in this state that such an attachment creates a specific lien in favor of the creditor upon the lands attached—a lien not less binding if pursued to the end by due course of law, than if it had been voluntarily created by the act of the debtor. It is a proceeding frequently resorted to—well known and much relied upon by all business men—an element materially influencing the daily transactions of business.

Practically it differs but little from a mortgage. Like a mortgage it is no proof of a subsisting debt till adjudicated upon. The mort-

gagee like the attaching creditor is not obliged to resort to the lands mortgaged—he may collect his debt out of other lands or property of his debtor;—his debt may be paid before a decree of foreclosure expires, and he may never get any legal title to the lands mortgaged. In short, a mortgage, like an attachment, is merely security for a debt. The main differences are that the one arises from contract—the other by proceeding *in invitum*;—the one takes the whole land by foreclosure, if not redeemed, the other by levy takes only enough by appraisal to pay the debt; the one has a right to possession upon breach of condition—the other only till six months after levy of execution. But whatever the special differences by which the creation or processes of execution are perfected, their main object—their substantial ends are the same—the security of debt. Regarding the intent of the statute and the universal practice under it as to attachments—and the oft-repeated language of our courts when speaking of them, we feel bound to regard them as creating specific liens upon the lands attached, and vesting in the attaching creditor a right in equity to redeem the lands from a prior incumbrance in order to make his own claim available or beneficial to himself.

If we were to hold otherwise, an attachment of lands subject to mortgage would be nugatory—always liable to be defeated by foreclosure of the prior mortgage. Such an exception would practically defeat the value of the law authorizing attachments, for every one who was in debt and likely to have his lands attached would protect them from such a liability by a mortgage.

The nature of the interest which the attaching creditor obtains—viz: security on the land for the debt—is so like that of a mortgagee that we think he should be entitled to the same right of redemption.

Such, too, are all the analogies of the law, and the rule as laid down by all elementary writers fairly includes them.

Judge STORY, 2 Eq. Jur. p. 864, § 1023, after enumerating various persons entitled to redeem, (among whom he names "judgment creditors and tenants by *elegit*," whose rights are merely *to secure their debts*), says: "and indeed every other person being an incumbrancer, or having legal or equitable title, or *lien* therein, may insist upon a redemption of the mortgage in order to a due enforcement of their claims and interests in the land." Nor does it make any

difference whether the lien or interest is acquired by operation of law, or otherwise. So Hilliard on mortgages, vol. 1, p. 247, says he is allowed to redeem who is entitled to the legal estate of the mortgagor, or claims a subsisting interest or lien under him.

We need not refer to our own decisions to show that this interest is held to be a lien, or to dwell upon its qualities to show that from its nature it must be a lien.

It is somewhat difficult to perceive upon what ground the *dictum* in *Nichols* v. *Holgate*, 2 Aiken, can be sustained. The mere *dictum* of the learned and cautious judge who delivered the opinion in that case, when expressed after discussion and consideration of the subject, would be entitled to great respect. But nothing in the statement of the case, or in the arguments of counsel, indicate that that point was raised. It is only from the passing remark of Judge SKINNER, at the end of his opinion, when directing as to the entries by the clerk for disposing of the case, that we can suppose the point to have been made. It was a point obviously of minor importance, and probably not at all discussed or considered;—a suggestion to the clerk made at the moment for disposing of the case, rather than a decision to establish a precedent. At the time *Nichols* v. *Holgate* was decided an opinion undoubtedly prevailed to some extent, that the interest of an attaching creditor not being an interest in land, his right was not only one that need not be noticed in a bill to foreclose, but ought not to be. See 5 Day, 77, and the argument of counsel in 5 Conn. 544, and the remarks of Judge BRISTOL;—but since 5 Conn. 544, it would seem that in Connecticut the attaching creditor may be joined.

The suggestion of Judge DAVIS in *Downer* v. *Fox*, 20 Vt. 392, is clearly mere *dictum*, and founded obviously upon the remark in *Nichols* v. *Holgate*. Neither of those cases ought to be regarded as decisions upon the point.

The general rule as to the joinder of parties in bills of foreclosure is that the mortgagee may join all who have a subsequent interest in or a lien or incumbrance upon the lands—all who may be interested in the accounting;—Daniels' Ch'y Pr., vol. 1, p. 324 and 325;—that all subsequent incumbrances may be joined. If not joined they are not barred by the decree. See authorities there cited. It is said

they are not barred though the mortgagee have no notice of the incumbrances; but perhaps under our system of registry and constructive notice this would be otherwise.

As a foreclosure is brought to cut off the right to redeem, it would seem proper to join one who has the right to redeem. Though the right may not have become fixed, absolute, irrevocable, by levy of execution, still, if it be a subsisting lien relied upon by him who holds it, it would seem consistent with every principle of law that he who claims a superior or prior right should be entitled to call upon the owner of the subsequent and inferior lien to redeem or be foreclosed. But whether the attaching creditor before judgment and levy may be joined or not, it is clear if he is not joined that his right to redeem is not affected by the decree. The universal rule that he who has not had his day in court is not bound by the judgment would seem to settle this matter.

The remarks of Lord Keeper FINCH as cited in 1 Daniell's Ch'y Pr. 325, are opposite to this point. "Though there be a great mischief on the one hand, that a mortgagee after decree against the mortgagor shall never know when to be at rest, for if there be any other incumbrances he is still liable to an account, yet the inconvenience is far greater on the other side; for if a mortgagee, that is a stranger to the decree, should be concluded, he would be absolutely without remedy and lose his whole money, when perhaps a decree may be huddled up purposely to cheat him, and in the meantime he (being paid his interest) may be lulled asleep; whereas on the other hand there is no prejudice but being liable to the trouble of an account which if stated *bona fide* between mortgagor and mortgagee shall be no more ravelled into."

Under our system requiring the record of all deeds, mortgages and attachments of lands, the mortgagee who omits to join the parties having subsequent interests and liens, may well be supposed to omit them intentionally and at his peril.

The case of *Lyon* v. *Sanford*, 5 Conn. 544, is in point to show that the attaching creditor not joined as a party in a bill of foreclosure is not bound by the decree.

Judge STORY, in his Eq. Plead. § 193, says, "If any incumbrancers are not made parties, the decree of foreclosure does not bind

them," and the numerous authorities cited in his note seem fully to sustain the position.

Indeed upon principle and without a precedent the doctrine would seem to be indisputable.

II. If Chandler had the right to redeem, and his right was not affected by the decree, the question then arises, did he exercise the right in such a manner as to entitle him to hold the mortgage he redeemed as a subsisting lien against Dyer provided Dyer claimed to hold the premises by his second mortgage.

It is to be noticed here, 1st, that Chandler's attachment took effect from the time the writ of attachment was served, and was therefore a prior lien to Dyer's second mortgage. When Dyer took his mortgage he took it having notice of Chandler's prior attachment, and subject to it.

2d. Chandler, when he redeemed Dyer's first mortgage, paid the money in virtue of his right to redeem, as the second incumbrancer, and in order to protect his lien by the attachment and make it available. He paid the money just before the time of redemption expired. He had not then obtained judgment for his debt, and could not tell whether it would be possible to secure and collect his debt otherwise than by a resort to these lands, when he should get final judgment. He could not tell when he would be able to get judgment, nor whether his debtor would then be solvent or have any visible property. Upon what principle could the exercise of his right to redeem under such circumstances be held to be a voluntary payment?

The exercise of the right to redeem a prior mortgage by a subsequent incumbrancer is the exercise of an unquestioned legal right—and, as against the mortgagor and all holding under him and subsequent to him who redeems, the effect of the redemption is not to extinguish the mortgage so redeemed, but to keep it alive. He does not pay the money as does the mortgagor to remove the incumbrance from the land, but only to suspend its operation as against himself, and prevent its rendering his own lien useless. The mortgagor cannot say to him, you have paid my debt,—removed an incumbrance from my land;—your claim by doing so becomes a mere personal

claim against me—it does not exist as an incumbrance on the land. That would be monstrous injustice—contrary to the very basis upon which successive mortgages are made. On the contrary it does remain a lien on the land till paid by the mortgagor, or by him who as the last owner of an interest in the equity of redemption stands in the place of the mortgagor. The principle that mortgages have preference in the order in which they are made, requires this. Nor can a subsequent mortgagee, who derives all his interest in the equity of redemption from the mortgagor have any greater or other rights than the mortgagor had when he made the subsequent mortgage. Nor can the fact that such subsequent or third mortgagee is the same person who holds the first mortgage—as Dyer is in this case—alter or increase his rights.

In this proceeding Chandler seeks relief against him as the holder of the third mortgage—to foreclose his claims and rights under that. He does not say to him, "you must pay me back the money I paid you to redeem your first mortgage"; but, "if you claim to hold the land by virtue of your second mortgage, you must hold it as you took it, subject to my prior lien by attachment, and subject to my right to redeem your first mortgage, and to continue to hold that also as a mortgage upon the land." By so doing he does not increase the burden on the land. Dyer has no more to pay than he knew he was subject to pay when he took his mortgage.

If Chandler could not redeem the first mortgage without thereby losing his claim for it as a charge upon the land, his right to redeem is worthless. He cannot make his lien by attachment beneficial without losing the amount he has to pay to redeem, and it would be only when the debt secured by the attachment was as large or larger than the prior mortgage that he could redeem without loss.

To hold that Dyer, being the holder of the first and the third incumbrances, can on that account have any greater right, by virtue of the third incumbrance, than would exist in case the owner of such third incumbrance was a different person from the owner of the first, would simply be to hold to the tacking of mortgages—a doctrine not adopted in this state, and finding but little countenance at any time in any of our sister states—and substantially abandoned in this

country. The application of that doctrine to this case would not be, in the language of the English books, "to squeeze out the intermediate incumbrancer," but rather to squeeze the first mortgage out of the second incumbrancer.

Neither can it deprive Chandler of his right to hold the mortgage he redeemed as a lien on the land,—that he would not have been barred by the decree if he had not paid it. He might well wish not to run the hazard of litigation upon that then undecided question in this state. Aside from such considerations—having the right to redeem he was not bound to wait till he was called upon or sued by the prior mortgagee—he could exercise his right at any time after the debt secured by the prior mortgage had become payable and redeemable. The second mortgagee stands in the place of the mortgagor as to his right of redeeming the first mortgage. 1 Hill. on Mort. 222.

Neither can he be deprived of his right by the fact that he finally levied his execution upon other lands of his debtor, and did not pursue his lien. This he had a right to do, precisely as a second mortgagee would have a right to do.

But at the time he redeemed the first mortgage he had not abandoned his lien. On the contrary he then was relying on it—paid the first mortgage because he relied on it, and because he did not then know that he would be able to find anything else to secure his debt upon when he finally should get judgment.

It would not seem to be a very equitable claim on the part of Dyer—that because Chandler had secured his debt upon other lands of the debtor, and had thus relieved the lands mortgaged to Dyer from an attachment of about $2000., thereby enhancing Dyer's security to that amount—that he should therefore be held to have been making a mere voluntary payment when he redeemed the first mortgage under the belief that it was necessary to do so in order to save his own lien by attachment. Upon this principle every second mortgagee who should redeem a prior mortgage in order to save his own, would be precluded from resorting to other property to secure his debt; for if he should do so, he would incur the necessity of losing the money paid on the first mortgage. This would be contrary to the well settled rights of mortgagees.

A payment so made by a second incumbrancer in order to make his own claim available is never held to be a voluntary payment, but the exercise of an equitable right.

In our own state the cases of *Downer* v. *Fox*, 20 Vt., and of *Paine* v. *Hathaway*, in the 1st Vt., illustrate the principle and apply it to cases where the equity was more doubtful than in the case at bar.

See also *Thompson* v. *Chandler*, 7 Greenleaf, 377; *King* v. *McVickar*, 3 Sandf. Ch'y 199; 8 Met. 411.

Decree reversed and case remanded to the court of chancery for a decree according to the prayer of the bill.

EUPHEMIA E. WARNER *v.* ISAAC WARNER'S ESTATE.

Wills. Cancelling. Republication.

Where the testator made his will in 1857, and wrote it mostly upon one side of a half sheet of foolscap paper, the signature and attestation clause being upon the other side of the same paper near the top, and two years afterwards wrote below all the writing and near the middle of the sheet, "This will is hereby cancelled and annulled in full this 15th day of March, 1859," it was held to amount to a revocation of the will by "cancelling," and it cannot be thereafter revived by parol declarations of such a purpose or desire on the part of the testator. KELLOGG, J., dissenting.

THIS was an appeal from a decree of the probate court disallowing the will of Isaac Warner deceased, and was tried by the jury at the Chittenden County Court, April Term, 1863, PIERPOINT, J., presiding, upon the plea, that the paper propounded was not the last will and testament of the said deceased.

The proponent introduced testimony tending to prove that two days before the death of said deceased, during his last sickness, he said to his wife (the proponent) that she would find in a trunk where he kept his papers, a will made out by him for her benefit; and that some three weeks after his death she examined the trunk and found among the papers the will in question, and that she thereupon presented the same to the probate court for probate. She also found

there a former will with the testator's name partly torn off. The following facts were duly proved and not disputed, viz: The paper propounded was dated August 22d, A. D. 1857. It was all in the handwriting of the deceased, except the names of the witnesses, and was folded and filed in the handwriting of the deceased, "Isaac Warner's last will and testament," and was in all respects duly executed, witnessed and published, at that date, as his last will and testament, he then being of sound disposing mind and memory. The deceased in the earlier part of his life was a practicing lawyer in this state. He died at Burlington on the 11th day of August, 1861, aged 79 years, leaving no will of later date.

The contestants claimed that the deceased on the 15th day of March, 1859, cancelled said will with the intention of revoking it, and in support thereof offered to prove that the deceased at that date wrote on the same paper on which the will is written at the foot of the writing of the will, and on the back of the same paper, what appears there written, with the intention of revoking said will. This was objected to by the proponent, upon the ground that such writing was not such an act of cancelling as the law makes necessary for the revocation of a will, although the deceased might have done it with intent to revoke said will.

It appeared that the will was written upon a sheet of foolscap paper and covered the first page and about one-third of the second page, and that thus far there were no marks of obliteration, cancellation or defacement upon the paper. But upon the last half of the second page were written the following words: "This will is hereby cancelled and annulled. In full this 15th day of March in the year 1859," and several lines lower down upon the page are the following words, erased.

"In testimony whereof I here I have."

Written lengthwise of the paper as folded, and below the filing of the paper upon the back, being the outside on fourth page, were these words: "Cancelled and is null and void. I. Warner."

The court against the objection of the proponent admitted the testimony of one Charles F. Warner, which tended to prove that the testator intended the said writings upon the will as a revocation by cancelling, and that he first designed to make another will, but

finally decided to make no will, but leave it to the law to divide his property.

Upon the testimony and facts proved, the proponent claimed, that the court should direct a verdict establishing the will. The court refused so to rule, and submitted the case to the jury. The proponent asked the court further to charge the jury upon several points presented, which the court declined to do.

The jury returned a verdict that said instrument was not the last will and testament of the said Isaac Warner deceased.

To the several rulings of the court, the refusal to charge as requested and the charge as given the proponent excepted.

Daniel Roberts, for the proponent.

I. The will was not *revoked*.

1. Obviously, this was an attempt at revocation by a "writing," lacking, to completeness, only attestation. Failing as a written revocation, we cannot, for the sake of the intent, construe it to be, what it clearly was not, viz: "a *burning*, *cancelling* or *obliterating*."

2. The intent to revoke is, by itself alone, nothing. There must be the necessary statutory *act* done, to which the intent can attach itself. These acts are symbolic, and the law admits no substitution, or equivalents. Extreme strictness and literalness of construction prevails here. *Blanchard* v. *Blanchard*, 32 Vt. 62; *Leaycroft* v. *Simmons*, 3 Bradf. 44; *Clingam* v. *Mitcheltree*, 31 Penn. St. 25; *Hise* v. *Fincher*, 10 Iredell, 139; *Kent* v. *Mehaffey*, 10 Ohio (N. S.) 204.

3. This will was not *burned*, nor *obliterated*, nor *torn*. It was not *cancelled*. This is a question of definitions. The word *cancel* has its primary and its secondary, or figurative signification.

(*a.*) Etymologically, it has only the former meaning *cancello*—"1. To make like a lattice, to lattice. 2. (In the latin of the jurists)—to strike through a writing in the form of a lattice. (X)—to strike or cross out, to cancel, as *testamentum*, *chirographum*." Andrew's Latin Dictionary.

Cancel, *cancelled*. See Worcester, Webster and Richardson's Dictionaries; 2 Bl. Com. 309; Roget's Thesaurus Su. 552 and 756; Burrill's Law Dic. Bouvier's do. "Cancelled, defaced, rased, blotted,

or put out," "*illinire;*" Swinb. Part 7, § 16; *Stephens* v. *Taprell*, 2 Curteis, 458; *Winsor* v. *Pratt*, 6 E. C. L. 290.

(*b.*) This word in the statute is employed in this primary sense only. Its collocation with *burning*, *obliterating* and *tearing* denotes an act *ejusdem generis*. It denotes defacement, obliteration or other marks of repudiation upon the writing—the *script*. As a mere *singeing* is not a *burning* (*Clark* v. *Scripps*, 22 Eng. L. & Eq. 627) so no amount of cancellation is a "destruction" under the words "burning, tearing or otherwise destroying" in Stat. 1 vic. ch. 26. *Stephens* v. *Taprel*, *supra.*; *Goods of Fay*, 9 Eng. L. & Eq. 600; *Goods of Brewster*, 6 Jurist, (N. S.) 56.

Substitute for this primary meaning the secondary sense, and the statute will read—no will shall be *revoked*, except by *revoking* it.

The entirety of the will must be destroyed, so that it may be said it no longer exists as it was. *Reed* v. *Harris*, 33 E. C. L. 57; Redfield's Wills, 313, 314, and notes. Great inconvenience arises in holding that there may be a *virtual* compliance with the statute. Lord DENMAN, C. J., in *Reed* v. *Harris*. No declaration of burning, obliterating or cancelling is an equivalent for the *act* of burning, &c.

(*c.*) Whether these writings constitute the *act* of cancellation is determinable upon inspection. If the will does not appear to be cancelled, it is not cancelled, whatever the intent. In point are *Hilton* v. *King*, 3 Levinz, 86; *Lewis* v. *Lewis*, 2 Watts & Serg. 455; *McPherson* v. *Clark*, 3 Bradf. 95; *Martins* v. *Gardiner*, 8 Simons, 73; *Clark* v. *Smith*, 34 Barb. 140; *Grantley* v. *Garthwaite*, 2 Russ. Ch. 90; *Heise* v. *Heise*, 3 Penn. 246; *Overall* v. *Overall*, Little's Sel. Cas. RUFFIN, C. J., in *Bethel* v. *Moore*, 2 Dev. & Bat. 316; *Bibb* v. *Thomas*, 2 W. Bl. 1043, stands upon the ground of tearing only. *Reed* v. *Harris*, 33 E. C. L. 57; *Clark* v. *Scripp*, 22 Eng. L. & Eq. 627; 1 Williams' Ex. 113; 1 Jarm. Wills, 116, 117; 2 Am. L. Cas. 688, 692.

White v. *Casten*, 1 Jones' Law R. (N. C.) 197, ran upon the verge; but there was an actual tearing. This case questioned in Red. Wills, 319.

II. There was error in admitting the subsequent declarations of the testator and in the effect given to them in the charge. *Dan* v.

Brown, 4 Cowen, 483; *Waterman* v. *Whitney*, 1 Kernan, 157; *Lewis* v. *Lewis*, 2 Watts & Serg. 455; *Staine* v. *Stewart*, 8 Jurist (N. S.) 440; *Doe* v. *Palmer*, 6 Eng. L. & Eq. 155; Red. Wills, 331; 2 Am. L. Cas. 688.

III. This will was republished. 1 Wms. Ex. 169, 171, 175, 179; 2 Levinz, 86; 3 Add. 48; 2 Hagg. 209; 2 Am. L. Cas. 725-6; 2 Binn. 406; 2 Whart. 103; 22 Penn. St. 416; 1 Grant's Cas. 75; 8 Barr, 498; 40 Penn. 217; 5 Conn. 164; Red. Wills, 367.

(*Wm. G. Shaw* and *E. J. Phelps*, for the contestants,) cited 33 E. C. L. 57; *Avery* v. *Pixley*, 4 Mass. 460; *Moore* v. *Moore*, Phillimore, 109, 123; 1 Jarman, 155; 2 Am. Lead. Cas. 645; *Bibb* v. *Thomas*, 2 W. Bl. 1043; *Clark* v. *Scripps*, 2 E. L. & E. 630; 1 Wms. Ex'rs 110; *Baptist Church* v. *Robbarts*, 2 Barr, 110; Redf. on Wills, 367-70, 374.

BARRETT, J. The main question in this case is, whether the will was revoked by the act of the testator, in writing what he did on the second page of the instrument.

The statute prescribes the several and only modes in which a will, duly executed, may be revoked, viz: 1st, by some will, codicil or other writing. 2d, by burning, tearing, cancelling or obliterating. It is clear, and is conceded, that this will is not revoked by either of the first of said modes; nor by either of the other modes, unless it be by *cancelling*. That is a mode by itself, different and distinct from burning or obliterating, though obliteration may in some cases be an act of cancelling. In the present case there is no obliteration. So the only question is, was the act of the testator a *cancelling*, within the meaning and intent of the statute?

We regard it as a settled doctrine of the interpretation of statutes, that when an English statute is enacted in this state, if it had received a judicial interpretation in England prior to its enactment here, it is to be taken that the language is used in our statutes in the sense given to it by the adjudications in England, unless there is some other sense impressed upon it by attendant provisions of the statute thus enacted. But if it had received no such interpretation, it stands for interpretation here the same as if it had been first enacted here. Adjudications in England, made since such enactment here, have not the force of authority, as to the sense of the language

as used in our law. As resting on reasons that commend themselves to our approbation, all adjudications upon the subject may aid in giving to terms used a just sense and effect, having reference to the subject matter of, and to the purposes designed to be served by, the statute in question.

It is plain that the object of the statute 29 Car. II. is the same as that for which our similar statute was enacted; and, in the matter of wills, to provide ample security against their revocation being effectuated, unless by means insuring the utmost certainty that it was the intent of the testator to revoke what would otherwise stand for, and be effectual as, a will disposing of his worldly effects.

To this intent, the provisions in this behalf have been made. The class of acts of revocation, of which cancelling constitutes one mode, contemplates something to be done to the instrument itself, showing, or tending to show, that, by such act, the testator designed to make an end of it as his will; and each of the modes prescribed was designed to be equally effectual in that respect. If the document should be entirely burned up, or entirely obliterated, or torn into scraps, or covered over with closely-drawn cross lines, there would be no doubt as to the intent of the testator. But it has been held not to be necessary to go to that extent in any of the modes, in order to answer the requirements of the statute; and that the slightest degree of either mode, provided it appear even by resort to other evidence, that the act was done with the intent to have it constitute a revocation, is effectual as such revocation. Accordingly it has been decided that the slightest burning or tearing of the material on which the will was written, even though none of the script should be destroyed or effaced,—that the erasure of a single word, or the drawing of a slight line across the face of the script, partaking of the character of the act prescribed by the statute, if it appear to have been done in the accomplishment of such act, effectuates a revocation.

Now it is obvious, from the general current of the cases early and late, that the leading idea is, that the testator must perform some one of the prescribed acts upon the instrument itself, so that, when produced, it shall bear the mark of such act. What amounts to burning, to tearing, to obliterating, is not the subject of question. But what amounts to *cancelling*,—how, with reference to the text of the

instrument, must the act be done,—not as to the shape or character of the marks, but *where* must they be located, is the main point of debate in the present case. The proponent claims that the cancelling marks must be made upon some part of the written text of the will.

The Latin verb, from which the term *cancel* is derived, means to make lattice work, and the corresponding noun in Latin, in the plural, *cancelli*, signifies lattice work; and when applied to marks, means marks made in the form of lattice work. How this term came to be applied to marks made upon written instruments, for the purpose of destroying their validity, is obvious both from general and judicial history, not only as taught by the books, but as derived from observation. To draw cross lines over the face of a written instrument has been, and is, a common mode of showing the intent, thereby, to make an end of it as an instrument in force. In earlier times, when the ability to write was possessed by very few, the great mass of persons of all grades from the highest lord to the lowest peasant, could manifest their intent, with pen and ink, only by unlettered marks. While they would be dependent on the few skilled in the art, to draw their instruments of contract in making disposition of their property, they could and did resort to various modes, by which, without *clerkly* aid, to make an end of their validity.

From the fact that cross marks were so easily made, and, when made upon the face of a written instrument, were so significant that, thereby, the maker of them designed to put an end to the continuing validity of the instrument, this mode was recognized and adopted into the statute, in common with tearing, burning and obliterating, as one by which wills might be revoked. In some instances this mode might be preferable to either of the others, as when it should be desirable to preserve the legibility of the entire instrument, which might not happen as the result of burning, tearing or obliterating. While, therefore, a common and customary mode of manifesting the intent to abrogate the instrument, by drawing cross lines over the face of it, gave rise to the use of the term *cancel*, still the entire judicial history of the subject shows that *that manner* of marking an instrument is by no means essential in order to answer to the full force and effect of the term in its *legal* sense. The net result of

all the cases and all the text-books, as well as the reason of the thing, and the appropriate analogies, seems to be this,—that, when the instrument is so marked by the maker of it, as to show clearly, whenever it is produced, that the act was designed by him to be a *cancelling*, that act becomes effectual, by force of the statute, as a revocation of the will by cancelling.

In the present case the act of the testator was done, not only upon the paper on which the will was written, but upon such a part of it as always to go with that part of the will which contained the disposition of the property,—not indeed on the face, but on the back of such disposition. It is obvious that the *act* itself was designed to constitute a revocation by *cancelling*. This is not a mere memorandum or declaration, which, as such, operates a legal effect by force of the terms, but it was the performing of an act upon the instrument itself, which act operates the legal effect. If cross lines had been drawn over the face of the writing of the will, they would have been effectual, because they would have constituted an act done to the instrument, showing the intent of the testator, by that act, to destroy the validity of it. Instead of thus drawing lines, he equally performed an act to the substance of the instrument, and as inseparable from the written text as cross lines over its face, showing, with even clearer certainty, the intent, by that act, to destroy its validity. Instead of leaving the significance of informal marks to be fixed by the location they occupy, he formed the marks into letters and words expressive of their significance, and as effectually placed them upon the instrument, as if they had been made upon the face of the script of the will. If he had drawn a slight mark from the top to the bottom of the writing, though that would not have been *cancelli*, within the etymological and primary meaning of the term, still it is conceded that it would have been a *cancelling* of the will, if done with that intent, within the legal meaning of that term. We think that writing upon the will, as was done in this case, as nearly answers to the primary sense of that term, as such mark would, and, having regard to the ground on which effect is given to an act of cancellation, such writing answers every reason and requisite of the law.

The case of *Lewis* v. *Lewis*, 2 W. & Serg. 455, comes nearer to a position of conflict with the view we hold, than any one to which

attention has been called; yet its characterizing facts are so different from those of the case in hand, as, in our judgment, to relieve the two cases from any such conflict. In that case, the word "*obsolete*" was written by the testator on the margin, against a certain clause in the will. The court held that that did not, of itself, constitute a *cancelling*. There was no evidence, aside from what that word imported in that location, of the intention of the testator, as to the character and effect of the act of writing it. It was not a *cancellation* in the primary sense of the term, not being a *cross-marking* on the face of the writing. It was not in the wider sense accorded to it by the law, because it was not upon the writing at all, as and for a mark drawn over it. The word itself did not, in its position, indicate that the act of making it was designed to be an act of cancelling. It was so placed upon the paper that it might be separated and leave the written part of the will entire and intact. It might have been designed as a mere memorandum or declaration, to have effect as such, and not as the effectual fact which operates in virtue of the act of thus marking the instrument.

Several cases were cited in the argument, in which there had been erasures or interlineations, or both, and it was held that the wills were not thereby revoked, because it did not appear, on the one hand, to have been the intention of the testator to have the act constitute a *cancelling*, or, on the other, if so intended, that the act was completed by the testator having done all that he designed to do as constituting such act of cancelling. Such are *Winsor et al.* v. *Pratt et als.*, 6 E. C. L. 299; *McPherson* v. *Clark*, 3 Bradf. 95; *Martins* v. *Gardner*, 8 Simons, 73; *Clark* v. *Smith*, 34 Barb. 140.

The ground and reason of those and similar decisions are well stated, and cases referred to in Redf. on Wills, 315; also in 2 Am. Lead. Cases, 692, where it is said, "Although interlineations, intended to vary the sense of the will, and not to destroy it, cannot, in themselves, amount to a cancellation, there is no room for doubt, that, when taken in connection with actual erasures, they may go to make up the proof of a change of disposing purpose, and show a total or partial revocation of the instrument." And this is fully sustained by the authorities cited.

There is a class of cases of revocation by burning, tearing or ob-

literating, in which the principle and its application seem to us to be precisely the same that we adopt and make in this case. Primarily, and most naturally, the terms used imply as the idea of the law, that the burning or tearing is to be such as, virtually, to destroy the will as an instrument, and not merely enough to indicate, or be consistent with, an intent to abrogate it; and the same remark is equally applicable to a case of obliteration. Yet in *Avery* v. *Pixley*, 4 Mass. 460, it was held that taking off a seal, placed upon a will as a part of the act of executing the same, although the law did not require such seal, would operate a revocation by tearing, provided it was shown to have been done with that intent. So in *Moore* v. *De La Torre*, 1 Philmore, 375, the will and codicil were cut around the margin at the top and one side, but no part of the writing was touched, except the attestation clause of the codicil was cut through. In this condition they were found in the room of the testatrix after her decease, in a box in which she had kept her papers; and on their being propounded for probate, Sir JOHN NICHOL, after a most elaborate argument, said: "It is the duty of the court to put a rational construction upon this act. In my judgment it must have been done for the purpose of cancelling, revoking and destroying the validity of this instrument. I can put no other rational construction on the act. It must have been done not equivocally, but decidedly, for the purpose of revoking the instrument." The case, on appeal, was fully and most learnedly argued in the High Court of Delegates, before seven most able jurists in this department of the law, and the judgment of the Prerogative Court was sustained. In *Bibb* v. *Thomas*, 2 W. Black. 1043, the will was so torn by the testator as almost to tear a bit off, and then rumpled together and thrown upon the fire, but it soon fell off, and was picked up by a servant, and preserved. By the whole court, Dr. GRAY, Ch. J. "Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified four of these; and if these, or any of them, are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will or instrument itself be totally destroyed or consumed, burnt or torn to pieces. The present case falls within two of the specified acts described by the statute.

It is both a burning and a tearing. Throwing it on the fire with an intent to burn, though it is only very slightly singed and falls off, is sufficient within the statute." In *Reed* v. *Harris*, 33 E. C. L. 57, the doctrine of *Bibb* v. *Thomas* is fully asserted, but, in the last case, it was held that there must be an actual burning, to some extent, of the paper of the will. PATTERSON, J., said: "There must, at all events, be a partial burning of the instrument itself. I do not say that a quantity of words must be burnt, but there must be a burning of the paper on which the will is." Similar cases, in which the same doctrine has been held, might be referred to; but such reference is needless, as there is no substantial conflict of decision.

Now, as before intimated, the acts of burning and tearing in the cases cited, are as far from answering to the most natural import of the words used in the statute, as the act in the present case is from answering to the primary idea of making lattice work, or to the less restricted idea of drawing a cross, or even a single mark, on the face of the writing, in order to constitute cancelling.

On the whole, the true legal idea seems to be well expressed in 2 Am. Lead. Cases, 689, as follows: "All that is necessary to a revocation is an absolute revoking intention, manifested by any act, however slight in its nature, which can fairly be considered as a tearing, burning, cancelling, or obliterating, within the meaning of the statute of frauds, and the various legislative enactments which have been based upon it;" and in Williams on Executors, 110, that "the principle appears to have been established, that if the intention to revoke is apparent, an act of destruction or cancellation should carry such intention into effect, although not literally an effectual destruction or cancellation, provided the testator had completed all he designed to do for that purpose."

As to the extent to which such act of revocation must be done in order to be effectual, perhaps Mr. Justice COLERIDGE, in *Reed* v. *Harris*, *supra*, put as proper a general formulary as is to be found, or as can well be framed,—thus: "The question is put whether the will must be destroyed wholly, or to what extent. It is hardly necessary to say; but there must be such an injury, with intent to revoke, as destroys the entirety of the will; because it may then be said that

the instrument no longer exists as it was." This language was used with reference to burning or tearing, as a mode of revocation. Applying it to *cancelling*, "there must be such a marking, with intent to revoke, that it may be said that the instrument no longer exists as it was." In the present case, it would seem pretty palpable, that when the testator had written where he did, "this will is hereby cancelled and annulled in full this 15th day of March, 1857," the instrument no longer existed as it was.

Holding this to be sufficiently, in character, an act of *cancelling*, we proceed to remark, that the intent is so decisively manifested by it, as to give it full effect as an act of revocation. And we regard our brother PIERPOINT as having most aptly expressed the true legal idea, when he said in his charge to the jury, that "in the writing may be combined both an act and a declaration of intention."

Upon the face of the will, when produced, it was, in the eye of the law, cancelled; and the court would have been warranted in so ruling. This being so, the evidence that was received of the sayings of the testator, became immaterial, whether made at the time of the act of cancelling, or subsequently thereto. Hence it becomes unnecessary to decide whether the testimony, as to his sayings made subsequently to that act, would have been admissible as evidence of his intent in doing it, if it had been necessary for the defendant to show, *aliunde* the instrument, that the act was done with the intent to revoke the will by cancelling.

Some of the members of the court think the proponent had given occasion for the introduction of this evidence, by the character of the evidence which she had introduced in the opening of her case.

The only remaining question is, as to the republication claimed by the proponent to have been made by sayings of the testator a few days before his death.

The will was revoked by the act of cancelling. The law of this state, in cases like the present, recognizes as valid such wills as are made in the mode prescribed by the statute, which statute prescribes the only modes in which they may be revoked. When thus revoked, it would seem quite incongruous that the instrument could be restored to its original vitality and force by mere words, with-

out any further act done upon, or with reference to, such instrument.

In cases like the present, we have no wills at, or by force of common or ecclesiastical law, but only by statute. The substance of the 5th section of the statute of frauds, 29 Car. II. ch. 3, was enacted as early as 1787 in this state; and in 1821 the full force of that section, as also of the 6th section, was extended to personal as well as to real estate, and the same has been substantially the law of this state ever since. Slade's St. ch. 44, §§ 17, 18; G. S. ch. 49, §§ 6, 7.

The case before us does not bring in question the effect of executing a codicil with due formalities, after the act of revocation, or of another testamentary instrument, referring to, and designed to restore the revoked instrument; nor does it bring in question other acts done to or upon the instrument itself subsequently to the act of revocation; nor does it involve, or call for any discussion of the subject in the light of the cases decided in other states in which the English law as to wills has existed to a greater or less extent. We are therefore relieved from the complications and conflicts which the books show to have often troubled other courts; and for the additional reason that the evidence, upon which the point as to republication is predicated, could only bear upon the question of the intent of the testator in doing the act of revocation. The proponent had the full benefit of that evidence in that view, whether properly or not.

In the discussion and decision of this case, we have given no consideration to the act or words of the testator, in what he wrote upon the outside of the folded will under the filing.

The judgment is affirmed.

JOHN M. DYER v. ROSWELL A. GRAVES.*

Statute of Frauds. Assumpsit. Contract. Guaranty.

The defendant bargained by parol to sell to the plaintiff two parcels of land and the right to a spring of water, all belonging to the defendant's father, for the aggregate sum of $8000., and guaranteed one parcel to contain one hundred and ninety-six acres. The defendant had such an interest in the property as authorized him to sell it, but it was deeded by the father directly to the plaintiff, by a deed in common form, by description merely, and not by quantity, and the payment was made to the father. The piece guaranteed to contain one hundred and ninety-six acres was deficient in quantity, and the plaintiff brought this suit in assumpsit in a special count on the contract of guaranty, and in the common money counts, to recover the value of such deficiency. *Held*, that the contract of guaranty, being part of the contract for the sale of land, for an aggregate and indivisible consideration, was within the statute of frauds, and, being by parol, could not be enforced by action.

There could be no recovery on the money counts as no part of the purchase money was paid the defendant.

ASSUMPSIT in a special count and the common counts. The case was referred and the referee reported the facts substantially as follows:

On and previous to March 31st, 1862, Augustus Graves, the father of the defendant, was the owner of a farm in Salisbury, situate partly on the east and partly on the west side of the Rutland and Burlington railroad, and bounded on the west by Otter Creek. The defendant resided with his father upon the farm, and had made a parol arrangement with his father that he might have the farm for $10,000., provided the defendant could make sale of enough of the farm to realize the sum of $8,000. to be paid to the said Augustus, and in such case should have the homestead, to be kept as a homestead, for the balance, $2,000. This homestead part was in fact worth $4,000.

After this arrangement between Augustus Graves and Roswell A. Graves, the defendant applied to the plaintiff to sell him that portion of the farm lying west of the railroad, and propositions were made back and forth between them as to that part of the farm and a certain portion lying east of the railroad, not including the homestead. The defendant represented that the title to the farm was in his father, Augustus Graves, but that he had such an interest in the matter as

*This case was heard at the January Term, Addison County Supreme Court, 1864, and held for advisement until the General Term, held at Montpelier, Nov'r, 1864.

authorized him to sell the land, and procure the passage of the title. The defendant represented and guaranteed that there were, in the parcel lying west of the railroad, one hundred and ninety-six acres of land. Relying upon the representations made by the defendant, the plaintiff offered for the parcel below the railroad and such part lying east of the railroad, and the privilege of a certain spring of water, the sum of $8,000.; four thousand to be paid down in money and such notes, to be endorsed by the plaintiff, as would be satisfactory to Augustus Graves, and the balance in four equal annual payments, with interest, to be secured by mortgage on the premises to said Augustus Graves. This proposition the defendant accepted, and called upon the plaintiff to pay something "to bind the bargain," as he said. The bargain was then stated over by both parties, (and witness called to it,) in the terms above set forth, and that the defendant was to make the piece west of the railroad one hundred and ninety-six acres. Thereupon the plaintiff paid the defendant fifty dollars on the contract, and it was arranged (this being Saturday night) that the parties should meet the next Monday morning for the execution of the deeds and papers, and the payment of the balance of the price, and that for convenience and to save the expense of two deeds, the conveyance should be made direct from said Augustus Graves to the plaintiff.

On the next Monday morning (being March 31, 1862,) these parties met with Augustus Graves for the purpose above named. The plaintiff and Augustus Graves there arranged between themselves the payment of the four thousand dollars to be paid down, and the balance to be paid on time, according to the bargain of Saturday night; such payment down, after deducting the $50. handed to the defendant as above, was made to the said Augustus Graves by the plaintiff, partly in notes of third persons, endorsed by the plaintiff, and partly in the plaintiff's own note, payable at a bank. The deed was a warranty deed in common form from Augustus Graves to the plaintiff, dated March 31st, 1862. The plaintiff went into possession of the premises conveyed, and never offered to rescind the contract, and paid the mortgage notes as they fell due.

On the same occasion Augustus Graves conveyed to the defendant the balance of the farm for the price of two thousand dollars.

There were no writings made or executed except the deed of Augustus Graves to the plaintiff, and the notes and mortgage named above. The defendant's counsel seasonably objected to the admission of parol evidence to prove the contract relied upon, and claimed that no action would lie upon the contract claimed, for the reason that the same was not in writing.

There was in fact only one hundred and seventy-three acres and four rods of land in the parcel lying west of the railroad, measuring to the margin of the water of Otter Creek.

After stating the number of acres of deficiency and their value, the referee referred to the court to say what damages, if any, the plaintiff was entitled to recover.

The plaintiff made no claim upon the defendant for any deficiency in the land until he brought this suit, and had made no actual survey of the land until after he brought this suit.

The county court, upon a hearing upon this report, at the December Term, 1863, Addison county, PIERPOINT, J., presiding, rendered a judgment for the plaintiff for the largest sum specified in the report, *pro forma*,—to which judgment the defendant excepted.

Prout & Dunton, *J. W. Stewart* and *G. F. Edmunds*, for the plaintiff.

I. The provision of the statute of frauds, that "no action at law or in equity shall be brought * * * to charge any person * * * upon any contract for the sale of lands, tenements or hereditaments, or for any interest in or concerning them," has no application to this case.

This provision of the act has a limited operation and effect, and by construction always has, since its enactment. Its design and object is to *prevent* fraud, and not to shield and protect a party from all liability for deceit, misrepresentation or mistake. It is upon this principle that an action may be maintained for a misrepresentation as to the boundaries of premises conveyed. 1 Sugden, 322, § 22. For a false representation as to the trade or income of the property leased; 1 Sugden 322, § 23; *Dobell* v. *Stevens*, 10 C. L. 201; *Pilmore* v. *Hood*, 35 C. L. 43; *Clark* v. *Baird*, 5 Seldon, 183. For a fraudulent misrepresentation as to incumbrances; *Haight* v. *Ex'rs of Hayt*, 19 N. Y. 464; *Whitney* v. *Allaire*, 1 Comstock, 305. For the

price paid under a mistaken representation as to the title; *Martin* v. *McCormick*, 4 Seldon, 331.

II. The action is not brought to enforce, or upon a contract for the sale of land. All that portion of the contract within the statute of frauds has been executed. But is brought for the recovery of an *over payment* for real estate purchased at a stipulated price per acre. In this respect the case is within the principle of the following authorities: *Green* v. *Saddington*, 90 C. L. 502; *Pierce* v. *Woodward*, 6 Pick. 206; *Sandford* v. *Rose*, 2 Tyler, 428; *White* v. *Miller*, 22 Vt. 380; *Brown, Adm'r*, v. *Sawyer*, 1 Aik. 130; *Cook* v. *Mix*, 11 Ct. 432; *Thayer* v. *Viles et al.*, 23 Vt. 494; *Kelly* v. *Pember*, not reported; *Jordan and Wife* v. *Dyer*, 34 Vt. 104; 1 Sugden, 430, 431, 161, 299, 300; *Ascutney Bank* v. *McK Ormsby*, 28 Vt. 721; *Holbrook* v. *Holbrook*, 30 Vt. 432; *Greer* v. *Greer*, 18 Maine, 16; *Brackett* v. *Evans*, 1 Cush. 79; Addison, 61 and 62; 2 Parsons on Con., p. 315, note (n.); *Harwood* v. *Est. of Harwood*, 22 Vt. 507; *Pierce* v. *Weymouth*, 45 Maine, 482.

Still another view may be taken of the case, and one which is fully justified by a recent authority—*Kelly* v. *Pember*.

To the extent that there is a deficiency in the number of acres paid for by the plaintiff, there is a *failure of consideration*, which may be recovered at law. This was in effect done in *Kelly* v. *Pember*, and in the scope of the decision cited from the 11th of Ct. *Richardson* v. *Boright*, 9 Vt. 368, must be regarded as overruled by *Kelly* v. *Pember*. Recent authorities all tend in this direction.

III. The payment to Augustus Graves was in legal effect a payment to, or for the benefit of the defendant, *at his request*.

E. N. Briggs and *E. J. Phelps*, for the defendant.

1. No fraud on the part of the defendant was charged in the declaration, claimed on the trial, or found by the referee. The plaintiff's right to recover, therefore, rests entirely upon the alleged contract of warranty.

2. That contract is void, by the statute of frauds. It was a contract "for the sale of lands." C. S. p. 452.

(a.) The warranty constituted one of the terms of the plaintiff's agreement to buy the farm. It was the defendant's side of that agreement, and the one formed the consideration for the other.

Apart from the agreement to purchase, the warranty would be without consideration. *Bloss* v. *Kittridge*, 5 Vt. 28; *Reed* v. *Wood*, 9 Vt. 285. The plaintiff, therefore, can no more recover for a breach of the warranty, than the defendant could have recovered of the plaintiff for a breach of the agreement to purchase if he had refused to carry it out.

(b.) Nor is the operation of the statute confined to those agreements which form actual parts of contracts for the sale of land. *Buck* v. *Pickwell*, 27 Vt. 157; *Davis* v. *Farr*, 26 Vt. 592; *Bliss* v. *Thompson*, 4 Mass. 488; *Walker* v. *Constable*, 1 Bos. & Pul. 306; S. C. 2 Esp. 659; *Henly* v. *Brown*, 1 Stewart, 144; *Gray* v. *Patten*, 2 B. Mon. 12; (these cases cited in 2 Sugden's Ven. & Purch., last Am. edition, p. 105, note 1); *Hughes* v. *Moore*, 7 Cranch, 176.

(c.) The right to recover the purchase money where a parol contract for the sale of land has been carried into effect by conveyance and possession, is not an exception to the general rule, but stands on very different ground. The action in such case is not upon the contract, but upon the accrued and liquidated indebtedness resulting from the complete execution of the contract. *Ballard* v. *Bond*, 32 Vt. 358. And may, therefore, however special the terms of the contract, be recovered in general assumpsit. *Cutter* v. *Powell*, 2 Smith's Lead. Cases, pp. 24, 27, 29; *Vail* v. *Strong*, 10 Vt. 457.

3. The warranty was not the contract of the defendant, but of his father. He acted in the transaction only and avowedly as the agent of his father.

BARRETT, J. This is an action of assumpsit in a special count, and the common money counts, in which the plaintiff claims to recover upon a contract with the defendant, for the breach of a guaranty made by the defendant, as to the quantity of a certain parcel of land. The plaintiff places his right of recovery upon the ground of the contract for the purchase of real estate, of which said guaranty constituted a part; which contract was by parol.

As the case does not show that the defendant had any of the purchase money that was paid for the property, there is no ground for recovery under the count for money had and received. By the mutual understanding of the parties, the $8000. was to be, and was paid, or secured by the plaintiff to the defendant's father,—he being

the owner of the property sold. The report states "that the plaintiff and Augustus Graves arranged between themselves the payment of the $4000. to be paid down, and the balance to be paid on time, according to the bargain of Saturday night. Such payment down, after deducting the $50. handed to the defendant to bind the bargain, was made to said Augustus by the plaintiff, partly in notes of third persons endorsed by the plaintiff, and partly in the plaintiff's own note payable at a bank." This shows that said $50. was regarded as paid to the defendant, as part of the $4000. to be paid down; and so far as the father was concerned, it is properly held by him as against the plaintiff. No point, however, is made in the argument, upon the payment of said $50., as giving a right of action for that particular sum. The rest of the payments were all made or secured directly to said Augustus Graves. Upon these facts, even if the contract should be held valid as against the statute of frauds, there is no foundation for the count for money had and received. And we think there is none for the count for the money paid; for no money was paid by the plaintiff for the defendant. It was paid directly to the owner of the land as the price thereof.

In this connection it is to be remarked that this case does not fall within the principle of the cases cited, of which *White* v. *Miller*, 22 Vt. 380, is a sample, as is obvious for reasons arising from the view just presented, as well as by reason of the character of the contract itself. This was not a sale, *by the acre*, of a given parcel of land, in respect to which there was a mutual mistake, or a fraudulent deception as to the number of acres; but it was a sale of two parcels of land and the right to a spring of water, for a specified aggregate sum of money. The representation as to the quantity embraced only one of the parcels. Hence it is clear that a price by the acre was not, and could not have been in mind as an element or feature of the contract.

It is further to be remarked that no fraud is alleged, as characterizing said representation; and, if there had been, there has not been any offer to rescind, nor any repudiation of the contract, as laying the foundation for an action to recover back the money paid, as there was in some of the cases cited. On the contrary, the plaintiff abides by the contract in all its parts,—holds the land under the deed, and

brings this action to recover, by force of the contract, the value of the deficit in the quantity of the land, as it was guaranteed to be.

To the claim that the plaintiff is entitled to recover on the ground of the failure of consideration, to the extent of that deficiency, what has already been said, as to the ground for a recovery upon the money counts, is applicable; for it is seeking to recover for an overpayment, which was not made to the defendant, but to his father.

On the whole, therefore, the legal character of the case seems to be truly presented by the special count; and upon that count he must stand for the assertion of his rights in the present action. That count sets forth, and the report shows, a clear case of breach of the warranty, made as part of the contract for the sale of the land. For present purposes we do not discuss at all a view presented by the defendant's counsel, viz: that the defendant was acting as the agent of his father, in negotiating the sale and making the warranty. We confine our consideration of the case exclusively to the question made as to the operation of the statute of frauds,—assuming that the warranty was the defendant's personal undertaking.

The contract of sale, including the warranty, was by parol. The property was conveyed to the plaintiff and payment was made therefor conformably to, and, so far, in execution of the contract, and so far, the contract is beyond the reach of the statute. But the part of the contract which consists in the warranty, still rests in parol, and is unexecuted. The defence is that the action is not maintainable because it is brought for the alleged breach of a contract for the sale of land.

The leading principles of the law of the subject are well enunciated in the case of *Davis* v. *Farr*, 26 Vt. 592, and of *Buck* v. *Pickwell*, 27 Vt. 168, though neither of those cases, nor any case that has fallen under our notice, presents the subject as involved in the same state of facts as exists in this case.

The books show, that, in case a contract for the sale of land, or of an interest in, or concerning land, embraces some subject matter of a different character, which stands in the contract upon a distinct consideration, so that the contract both in its subject matter, and the consideration, is divisible and separable, such contract, though not in writing, may be enforced by suit, as to such part of it as does not

fall within the operation of the statute of frauds; while that statute would effectually preclude an action upon the other part of it.

Of such a character is the case of *Green* v. *Saddington*, 90 E. C. L. 502. In *Hodgson* v. *Johnson*, 96 E. C. L., it is held that, unless the contract be so divisible and separable, the statute will preclude an action upon any part of it. In the latter case, other cases were brought to the attention of the court, and the case of *Green* v. *Saddington* was specially remarked upon by Lord CAMPBELL, Ch. J., and by CROMPTON, J., and was regarded by them as standing upon the divisible and separable character of the contract and consideration. The opinion pronounced by Lord CAMPBELL, presented the point in a clear light, and is worthy of attention.

In the case before us, the warranty was, in terms, a part of the contract of sale, and the consideration of the whole contract was entire and indivisible, viz: $8000. to be paid for the whole land and the right to the spring and the guaranty as to the quantity of one parcel of said land.

The case of *Ballard* v. *Bond*, 32 Vt. 355, seems to stand upon the same principle as *Hodgson* v. *Johnson*, and, in its legitimate application, to be controlling in the present case. The plaintiff and defendant made a parol contract that the former should convey to the latter a farm for a certain price, and that if the plaintiff could within a year find a purchaser at a higher price, the defendant should convey the farm to such purchaser, and that the plaintiff should have one-half of the gain so made. The plaintiff conveyed the farm to the defendant, and received payment therefor. Within the specified time he found a purchaser at an advance; but the defendant would not convey to such purchaser. It was held that that contract was within the statute of frauds, and that the plaintiff could not recover for the breach of it.

It has been held in several of the states as well as in this state, that, where the contract for the sale of land, or for an interest in land, has been fully executed by a conveyance, payment therefor may be enforced by an action; as in *Ascutney Bank* v. *McK Ormsby*, 28 Vt. 721. But we think no case is to be found, in which the purchaser, upon payment of the purchase money, has been held entitled to maintain an action to recover damages of the other party, for refus-

ing to convey, or to perform any other stipulation of the contract touching the sale of land or an interest in land. The distinction is well marked by Ch. J. POLAND, in *Ballard* v. *Bond*.

The contract of guaranty in this case was, in effect, an undertaking by the defendant to make the plaintiff compensation for the deficiency in the number of acres specified. This certainly was part of the contract for the sale of the land, and as it was not in writing, and this part is still unexecuted, we concur in holding that it is within the intent and effect of the statute of frauds.

The *pro forma* judgment of the county court is reversed, and judgment upon the report is rendered for the defendant.

ALVA WOOD AND LOYAL M. WOOD v. JAMES N. WILLARD AND OTHERS.

Trespass. Evidence. Declarations. Constructive Possession.

In a controversy respecting the location of the dividing line between lands of individuals, the declarations of deceased persons, who had actual knowledge as to the location of such line, or who had peculiar means of knowledge, so that it may fairly be inferred that they had actual knowledge of the same, made at a time when they had no interest to misrepresent, and made when upon, or in the immediate vicinity of the line, and when pointing it out, may be received as to the location of such line, when from lapse of time there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject.

Where the defendant claimed by adverse possession to a line not marked so as to be discernable, the fact that he had for over twenty years enclosed the land in dispute with his other lands by a fence which extended and embraced other land of the plaintiff beyond the line to which he claimed, would not give the defendant constructive possession to such line.

TRESPASS on the freehold. Plea, the general issue, and trial by jury, Windsor County Court, December Term, 1863, BARRETT, J., presiding.

The controversy between the parties was in relation to the dividing line between lands owned by the plaintiffs and lands owned by James N. Willard. The plaintiffs owned the west part, and the said Willard the east part, of what is known as the "Governor's Right,"

being five hundred acres of land reserved by Governor Wentworth to himself in the original charter of the town of Hartland. The plaintiffs claim title by virtue of a deed from David H. Sumner to them, dated April 24th, 1860, and the defendant, James N. Willard, by virtue of a deed from Thomas A. Denny to him, dated January 17th, 1829, which deeds were introduced in evidence by the respective parties. The plaintiffs also introduced in evidence certified copies of the deeds of partition of this land, between the then owners and occupants, dated August 26th, 1812, being from Oliver Gallup and Thomas Denny to Charles Willard, of the west part, and from Charles Willard to said Gallup and Denny, of the east part, and a mortgage deed from Charles Willard to David H. Sumner, of the west part, dated March 22d, 1817, and a writ of possession in favor of said Sumner against Charles Willard, reciting a decree of foreclosure of said mortgage, dated June 20th, 1820, on the back of which was a writing, without date, signed by Charles Willard, acknowledging that he held possession of said land under said Sumner.

The defendants also introduced in evidence a deed from Thomas Denny to Thomas A. Denny, dated April 5th, 1819, conveying the same land covered by the deed to James N. Willard from Thomas A. Denny, and a deed from Jonathan H. Hubbard to James N. Willard, dated December 16th, 1833, conveying lands lying northerly of the land in controversy, and north of Hartland town line.

It appeared in evidence on trial, that before the deeds of partition were executed, a suit was pending in court in relation to the division of said lands, in which Thomas Denny and Charles Willard were parties, and that at that time said Willard lived on the west part, and said Denny on the east part, of the "Governor's Right," and that the controversy in said suit was as to the dividing line between their respective lands; and that the suit was taken out of court and the controversy settled by the parties by their agreeing upon a division of the lands, and said deeds of partition were thereupon executed.

It further appeared in evidence, that Charles Willard lived upon the land now owned by the plaintiffs ever after said deeds of partition were executed, until the death of his son, Charles Willard, Jr.,

which occurred in November, 1845, and that he remained in possession in his own right until after Sumner had foreclosed his mortgage, and after that in possession under Sumner, as Sumner testified,—who was the only witness on this point,—until he leased the same to Charles Willard, Jr.; and that Charles Willard, Jr., remained in possession eighteen years, successively, until his death, as tenant to said Sumner. After the farm was thus leased to Charles Willard, Jr., his father, Charles Willard, continued to live with him upon the farm, and worked upon, and assisted to carry on the same to the extent of his ability.

It further appeared in evidence, that Thomas Denny and Thomas A. Denny, after the settlement of said suit and the execution of said deeds of partition, both continued to live upon the east portion of the "Governor's Right" until Thomas A. Denny deeded to James N. Willard, as above stated. That after the execution of said deed he, Willard, moved on to said farm the latter part of February, 1829, and that Thomas Denny and Thomas A. Denny remained on the farm until after the first of April then next, and kept their stock there, and Thomas A. Denny, after the first of April, remained on said farm from one and one-half to two years, as a boarder with James N. Willard.

It appeared in evidence, that the land in controversy is bounded northerly by Hartford town line and southerly by Quechee river. The plaintiffs claimed as their corner near Quechee river, a hemlock tree, standing between nine and ten rods northerly from the river, and as their corner on the town line, another hemlock tree, and that the true division line ran between these trees.

The defendants claimed that the true corner on the Quechee river was at the mouth of a little brook, a few rods west of the line as claimed by the plaintiffs, and gave evidence tending to show that formerly there stood at the mouth of this brook, on the bank of the river, a hemlock tree, marked, which was washed away by the river, together with the bank on which it stood, about thirty years ago; and that the fence which divided this portion of the respective lands commenced at this hemlock tree and run northerly, some few rods west of the present fence.

The defendants claimed, as the true corner on the town line, a cer-

tain soft maple tree, standing about eighteen rods west of the hemlock claimed by the plaintiffs as a corner, and gave evidence tending to prove, that ever since James N. Willard purchased said land, he has always claimed this maple as the corner between his land and the plaintiffs' land on the town line, and has always thus claimed the said hemlock tree standing at the mouth of the brook, and the point where the same stood after the said tree was washed away, as the true corner between said lands on the Quechee. James N. Willard has always remained in possession of said lands purchased of said Denny, after taking possession thereof as above stated.

The defendants, after testimony had been adduced in respect to their title, and the title and occupancy of Thomas Denny and Thomas A. Denny, and the title and occupancy of Charles Willard and Charles Willard, Jr., and the title and occupancy of one Johnson of the lot, called the Johnson lot, lying north of the plaintiffs' land, and north of Hartford town line, and west of the Hubbard lot, and after showing the decease of all said persons, showed by the testimony of James N. Willard, that in the spring after he purchased of Thomas A. Denny, said Denny told him about said original law-suit, and the settlement of the same, and offered to get Charles Willard and go with him and James N. upon the land and point out the corners as agreed upon by the parties at the time of the settlement of said controversy; and that Denny did, after the 1st of April of that spring, get Charles Willard, and they all three went upon the land in controversy, at the corner near Quechee river; and offered to prove by the testimony of James N. Willard, that both Charles Willard and Thomas A. Denny, on this occasion, pointed out the marked hemlock tree as the corner which then stood near the mouth of the brook, on the bank of the Quechee, but has since been washed away, and told him, said James N., that that tree was the corner on the river between the lands now in controversy, and was the corner agreed upon in the settlement of said original controversy. (Said tree is the one referred to in the testimony as being claimed by the defendants as the corner.) This testimony was objected to by the plaintiffs and excluded by the court,—to which the defendants excepted.

The defendants further offered to prove by the testimony of James N. Willard, Jr., that whilst Charles Willard, Jr., was in possession

of the land now owned by the plaintiffs, as tenant under Sumner, he spoke to the witness, who was living with his father, James N., Sen., about straightening the fence and putting it on the line, and spoke of beginning at the soft maple tree on the town line as the corner. Also, that Charles Willard, Jr., while so in possession, spoke to the witness about said hemlock, which formerly stood on the bank of the river, at the mouth of the brook, as the corner on the river, and said it was the corner between the lands now in controversy. Also, that Charles Willard, Sen., whilst living with his son, Charles, Jr., upon the land now owned by the plaintiffs, and after he had ceased to have possession of the same under Sumner, told the witness that said hemlock which formerly stood at the mouth of the brook, was the corner between the lands now in controversy. All of which was objected to by the plaintiffs, and severally excluded by the court,—to which the defendants excepted.

The defendants further offered to prove other sayings of Charles Willard of the same character, to which the plaintiffs objected and the court excluded the same,—to which the defendants excepted.

The defendants' testimony tended further to prove, that the land where the trespass was claimed to have been committed by the defendants, was enclosed by a fence with James N. Willard's other lands, and had been so enclosed for some twenty-six or twenty-seven years, and that this fence enclosed land belonging to the plaintiffs not claimed by James N. Willard, as well as the land in controversy, with the Hubbard lot and said Willard's other lands, and that said Willard had, ever after he purchased said land, claimed the soft maple as his corner, and a line directly from the soft maple to a hemlock near the mouth of the brook, as the true dividing line between his land and the plaintiffs; and that James N. Willard and his sons, by his direction, had, on various occasions and in different years, for the last twenty-six years, cut and taken wood and timber from the land in controversy, claiming the land as his own, and that no person had ever disputed his right to do so; and he claimed that he had thereby acquired a right to the land in controversy by possession.

The defendants requested the court to charge the jury, that if they found that the said James N. Willard had had possession of the land in controversy for over fifteen years, claiming to be the owner

thereof, as his testimony tended to prove, and during all that time the same had been enclosed with his other lands, as the testimony tended to prove, and during all that time had claimed the soft maple as his corner, and a direct line from this maple to the said hemlock at the mouth of the brook, that his possession would be limited by his claim, and would be adverse to the extent of his claim, but would not include the lands of the plaintiffs so enclosed with the defendants' lands, which were not claimed by said Willard as belonging to him. The court declined to charge as requested.

There was a vast amount of other testimony upon both sides in respect to the location of the dividing line between the lands of the parties and the trespasses alleged to have been committed.

Upon the subject of said request, the court charged the jury, that in order for the defendant to acquire title beyond his actual, and by constructive possession, that it was necessary that he should have claimed to a definite line, indicated and marked upon the land so as to be discernable,—explaining to the jury the subject of actual and constructive possession in a manner satisfactory to both parties. The court further charged, that the fact of such an enclosure of the land in dispute with other lands of the defendants, as the evidence tended to show, by a fence which extended and embraced land of the plaintiffs beyond the line to which the defendants claimed, and which did not indicate any line to which he claimed, would not give the defendant a constructive possession to such line by virtue of his actual possession of a part of the land he now claims to hold by reason of adverse possession. To the charge as given, and to the failure of the court to charge as requested, the defendants excepted.

As to the evidence of sayings which were received subject to a proper charge in relation thereto, the court told the jury, that what Charles Willard said after the title had passed from him and had become absolute in Mr. Sumner, whether he was occupying as tenant of Sumner, or was living with his son, who was tenant of Sumner, and what Charles Willard, Jr., said while he was occupying as tenant of Sumner, as to the corners or lines of said land, did not bind Mr. Sumner, nor could be considered as evidence against him or the present plaintiffs as to what and where said corners and lines were. That what Thomas A. Denny said while he held title to the land

conveyed by him to the defendant, James N. Willard, tending to show the line to be further west than said Sumner and the plaintiffs claimed it to be, as it would not, if he were living and still holding the same title, be evidence in his favor, so it cannot be considered as evidence in favor of the defendant, who holds under him, against the plaintiffs, who hold under said Sumner. In other respects the court gave such instructions as to this evidence as the case called for. To the foregoing instructions the defendants excepted.

Verdict for the plaintiffs.

Converse & French and *A. Tracy*, for the defendants.

I. The testimony offered by the defendants should have been received. This testimony consisted of the declarations of *Charles Willard*, *Charles Willard, Jr.*, *Thomas Denny* and *Thomas A. Denny* and *Ulysses Johnson*, now deceased, on various occasions, and under various circumstances, as to the corners and line now in controversy.

We insist that their declarations were competent evidence as being the best testimony which the nature of the case would permit, considering the lapse of time since the settlement of the original controversy and the agreement as to the division of the lands.

From the very necessity of the case, and on principle, we insist that such testimony should be received; but we are not without the fullest authority in this country to sustain us. The rule in this country was settled as we claim it, in the earliest controversies in relation to dividing lines to lands, and has been steadily adhered to, and has become the *American rule* upon the subject. In *England* they confine such declarations to the boundaries of *parishes*, *manors* and the like, but it is not so restricted in this country. 1 Greenleaf's Ev. 175, (§ 145) notes (1842); 3 Dane's Abt. 397, 398, (Art. 4, §§ 1 to 6); *Boardman et al.* v. *Reed et al.*, 6 Peters, 340, 341; *Van Deusen* v. *Turner*, 12 Pick. 532; *Daggett* v. *Shaw*, 5 Met. 223, 227, (1842); *Porter* v. *Warner*, 2 Root, 22, (1793); *Higley* v. *Bidwell*, 9 Conn. 446, 450; *Wooster* v. *Butler*, 13 *ib.* 308, 315; *Kinney* v. *Farnsworth*, 17 *ib.* 355, 362, (1845); *Lawrence* v. *Hayes et al.*, 5 N. H. 33, 37; *Smith* v. *Powers*, 15 *ib.* 546, 563, (1844.)

The same rule was virtually recognized in this state in a case decided as early as 1817. *Pettibone* v. *Rose*, Brayton, 77.

The cases cited by Mr. Greenleaf in his note (p. 176,) show such to be the rule in *North Carolina*, *South Carolina*, *Virginia*, *Tennessee* and *Kentucky*. The decisions in the American courts seem to be uniform upon the question. There may well be a distinction between the decisions in this country and in England. The newness of our country, small proprietorships, and the perishable nature of division bounds would seem to require the rule of evidence as we insist it is.

The declarations of a tenant in possession, as to the character, extent and manner of his possession, are competent evidence against his landlord and those claiming under him. *Beecher* v. *Parmelee et al.*, 9 Vt. 352; *Carpenter* v. *Hollister et al.*, 13 Vt. 556; *Jackson* v. *Bard*, 4 Johns. 230; *Jackson* v. *McCall*, 10 *ib.* 376; *Williams* v. *Ensign*, 4 Conn. 456; *Davis* v. *Pierce et al.*, 2 Term R. 53; 1 Greenleaf Ev. 125, § 109.

II. The court should have instructed the jury as to the defendant James N. Willard's *possession* in accordance with the request. This possession was *adverse* to the extent of his claim. He was in the *actual* possession of the land in controversy enclosed by a fence, and would have constructive possession of all the land enclosed by the fence, were it not that he had *voluntarily limited his claim*. To the extent of his claim as made, we insist that his possession was good. *Constructive possession* has always been regarded as extending to *visible boundaries*, or to the boundaries *described* in a *deed* under which the party enters. This for the reason that an adverse claimant *can, upon inquiry, ascertain the extent of the party's claim*. *Crowell* v. *Beebe*, 10 Vt. 33; *Hull* v. *Fuller*, 7 Vt. 101; *Chandler* v. *Spear*, 22 Vt. 388–404; *Brown* v. *Edson*, *ib.* 357–362; *Buck et al.* v. *Squiers*, 23 Vt. 498–504; *Swift* v. *Gage et al.*, 26 Vt. 224–228; *Beecher* v. *Parmelee et al.*, 9 Vt. 352.

A party may *limit his possession*, by his acts and declarations, within less bounds than the survey under which he enters. *Brown* v. *Edson*, 22 Vt. 362.

Washburn & Marsh, for the plaintiffs.

1. The declarations of the owner of land in enlargement of his title or boundaries, cannot be proved as evidence in his own favor, or in favor of his grantee. *Smith* v. *Martin*, 17 Conn. 399.

2. The declarations of a former owner of land made after he had parted with his title, and while he continued to occupy as tenant under his grantee, as to the original boundaries of the land, cannot affect the *title of his grantee*, or of any one *claiming under his grantee*. *Pierce* v. *Faunce*, 37 Maine, 68.

3. In no event is the class of testimony offered by the defendant and excluded by the court, even when it comes within the rule necessary for its admissibility, ever favored by the courts; and unless the testimony offered comes clearly within all the conditions precedent for its reception, it will not be received. See Am. Law Register, Sept. No., 1864.

All the declarants whose testimony was excluded, ceased to have any interest in the land *at the time when they made the statements*, now sought to be proved through the lips of the several defendants and their friends.

They lack then the quality most necessary for their admissibility, of being declarations against their interest,—against their interest in any way,—saying nothing about being against their pecuniary interest. See *Ware* v. *Brookhouse*, 7 Gray, 454; *Bartlett* v. *Emerson*, 7 Gray, 174; *Flagg* v. *Mason*, 8 Gray, 556; *Currier* v. *Gale*, 14 Gray, 504; *Daggett* v. *Shaw*, 5 Met. 223; *Mary* v. *Stone*, 8 Cush. 4; *Shepherd* v. *Thompson*, 4 N. H. 213; *Waring* v. *Warren*, 1 Johns. 340; 1 Greenleaf Ev. §§ 145, 147, 148, note; *Stark* v. *Buswell*, 6 Hill, 405; *Carpenter* v. *Hollister et al.*, 13 Vt. 552; *Beach* v. *Wise*, 1 Hill, 612; *Bristol* v. *Darn*, 12 Wend. 142, and note; *Clarke* v. *Waite*, 12 Mass. 439; *Bridges* v. *Eggleston*, 14 Mass. 250; 17 Conn. 400.

Peerpoint, J. This is an action of trespass on the freehold, and the controversy between the parties at the trial below was as to the location of the dividing line between lands owned by the plaintiffs and lands owned by said James N. Willard.

It appears from the bill of exceptions, that prior to the year 1812 a controversy had arisen between one Thomas Denny and Charles Willard, who were then the owners of these lands, as to the dividing line between their respective lands, and a suit between them was pending in court.

This controversy was settled by the parties, by their agreeing upon a division of said lands, and deeds of partition were thereupon exe-

cuted, dated the 26th day of August, 1812. The line of division then agreed upon is the line now in dispute. The said Charles Willard, from whom the plaintiffs' title is derived, took the west part, and the said Denny, from whom the defendant's title is derived, took the east part. On the 22d of March, 1817, Charles Willard mortgaged his part to David H. Sumner, who perfected his title thereto by foreclosure, and a writ of possession in June, 1820, and deeded the same to the plaintiffs on the 24th day of April, 1860.

Thomas Denny conveyed his half to Thomas A. Denny April 5th, 1819, and Thomas A. Denny conveyed the same to the defendant, James N. Willard, January 17th, 1829.

The land in controversy is bounded northerly by Hartford town line, and southerly by Quechee river.

The defendant claimed, that the true corner on the Quechee river was at the mouth of a little brook, and that formerly there stood at the mouth of this brook, on the bank of the river, a hemlock tree marked, which was washed away by the river, with the bank on which it stood some thirty years ago, and that this tree was the corner on the river. The defendants also claimed, that a certain soft maple tree standing on the Hartford town line, was the true corner there, and that the division line between the said James N. Willard's land, and that of the plaintiffs, was a line drawn from the said hemlock to the said maple. And to establish this claim, he offered to prove that on several occasions, after the said Charles Willard had ceased to be the owner of the land, now owned by the plaintiffs, or to have any interest therein or in either of said pieces, and before any controversy had arisen, he being upon the land, and at the place, pointed out the said hemlock tree, and the said soft maple tree, to the witnesses, as being the corners of the said lots, as agreed upon at the time of the division of the said lots between the said Thomas Denny and himself.

The defendant offered similar acts and declarations of the said Thomas Denny, made under like circumstances. The said Charles Willard and the said Thomas Denny being both dead.

These acts and declarations were objected to and excluded by the court, and in this it is claimed there was error.

These declarations of Willard and Denny, were hearsay testimony

only, and clearly come within the general rule, that such testimony is not admissible. To this rule however there are certain well established exceptions, and the question here is whether the evidence offered comes within any of those exceptions.

In England it is well settled that in questions as to ancient boundaries, concerning the extent of public municipal jurisdictions, public reputation, or the particular declarations of deceased persons, made before the controversy arises, are admissible. See Phil. Ev. 4th Amer. Ed. 219, note 87, where the authorities are collected and examined, a further reference to which is unnecessary here.

But the exception has not been extended there, to questions as to the boundaries between the estates of private individuals.

This exception seems to be founded in the necessity of the case. Questions as to these boundaries may arise long after all persons having any actual knowledge as to their location, shall have passed away; and there may be no other way of proving them, except by public reputation and tradition. The same reason seems to have led to an exception allowing this class of evidence in questions as to pedigree.

The reason upon which this exception is based, would seem to apply with equal force to questions as to boundaries between individuals. The fact that many persons may be interested in the establishing of the line of a municipal jurisdiction, cannot increase the difficulty of proving it under the general rule of evidence.

The landed estates in England are large and the boundaries thereof doubtless generally settled and clearly defined, so that questions as to them may not so frequently arise, and the necessity for resorting to this class of evidence for that reason, may not be so great, as in the case of municipal boundaries. In this country it is not so. In many of the states, and especially in this state, the territory within their limits was first divided into townships, and these were soon after subdivided into small lots, and distributed between the several proprietors. Almost the only evidence that was left upon the land, to indicate the location of the lines either of the townships, or of the division between the proprietors, was marks upon the trees standing thereon, and these evidences, from lapse of time, accidental causes,

and the cutting off the timber, are almost entirely obliterated, at least such is the fact in large portions of this state.

Questions are now constantly arising between individuals as to the location of these original lines, which to a great extent constitute the present division lines between adjoining land owners. How are these lines to be established? If it be said that it must be by the testimony of witnesses who have personal knowledge of their original location, they cannot be proved at all, as in the great majority of cases, all such persons are now dead.

The necessity resulting from the impossibility of proving the location of such ancient lines and boundaries, has led the courts in several of our sister states to extend the exception to the general rule excluding hearsay testimony, so far as to admit the declarations of deceased persons, who had knowledge on the subject, as to the location of ancient boundaries between the lands of private individuals.

Thus in *Smith* v. *Powers*, 15 N. H. 546, which was an action of trespass on the freehold, it appears from the case that there was a controversy between the parties respecting the true situation of the northerly and easterly lines of the lot in question. The plaintiff introduced evidence, that one John Rowell lived on the lot with his son. It did not appear what title he had, or that he had ever parted with it, if he had any, except that he moved away thirty or forty years before, and had not lived on the lot since. The plaintiff offered the declarations of said John, who had deceased, made after he had moved from the lot, that a certain birch tree, standing near the river, was the south-east corner of the lot. This was objected to and admitted.

In disposing of this question, PARKER, Ch. J., in his opinion says: "As to the declarations of John Rowell. It does not appear that he had any interest in making them, or any purpose to subserve thereby. It is true, as the defendant's counsel contend, that the decisions in England seem to restrict the evidence of the declarations of deceased persons, respecting boundaries, to cases which relate to public rights, or to boundaries in which several persons are interested, or to what the deceased said relating to the public opinion, respecting the bound-

ary. But the testimony has not been limited in this country. The authorities are amply sufficient to sustain the principle that the declarations of a person deceased, who appeared to have had means of knowledge, and no interest in making the declarations, are competent evidence upon a question of boundary, even in a case of private rights. Upon this principle the declarations of John Rowell are well admitted. It was in evidence that he pointed out the boundary." The same principle is recognized in *Lawrence* v. *Haynes*, 5 N. H. 37.

The same rule prevails in Connecticut. *Higley* v. *Bidwell*, 9 Conn. 446; *Wooster* v. *Butler*, 13 Conn. 308; *Kinney* v. *Farnsworth*, 17 Conn. 355. In the latter case, STORRS, J., says: "Within whatever limits the rule of evidence as to the admissibility of reputation on questions of boundary, is restricted elsewhere, it is well settled in this state that general reputation is admissible for the purpose of showing, not only public boundaries, such as those between towns, societies, parishes, and other public territorial divisions, but also the boundaries of lands of individual proprietors.

In *Boardman* v. *The Lessees of Reed et al.*, 6 Peters, 328, a question arose as to the admissibility of proof of the declarations of a deceased person, as to certain facts relating to a corner in dispute between the parties. Judge MCLEAN in his opinion states the rule as follows: "That boundaries may be proved by hearsay testimony, is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made. By the improvement of the country, and from other causes they are often destroyed. It is therefore important in many cases that hearsay or reputation should be received to establish ancient boundaries." This, says Mr. Hill in note 87, Phil. Ev. 219, well expresses the doctrine, and the reason of the doctrine, as it is now understood in the American courts. See also 2 Sergt. & Rawle, 69; 1 Watts & Sergt. 68; 3 McCord, 227.

From such cases as we have had an opportunity to examine, and from the other cases referred to by Mr. Hill in the note aforesaid,

where all the cases are collected and examined, we think a disposition is apparent in many of the American courts to extend the exception in favor of this class of testimony to ancient boundaries between individual proprietors; and that from a majority of the cases the principle may fairly be deduced, that the declarations of deceased persons, who had actual knowledge as to the location of such boundaries, or who from their connection with the property itself, or their situation and experience in regard to such boundaries, and the surveys thereof, had peculiar means of knowledge, so that it may fairly be inferred that they had actual knowledge of the same, made at a time when they had no interest to misrepresent, and made when upon, or in the immediate vicinity of the boundary referred to, and pointing it out, may be received as to the location of such boundary, when from lapse of time, there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject.

Under this rule we think the evidence as to the acts and declarations of said Willard and Denny, and perhaps of some of the other persons should have been admitted. The line in question was established between fifty and sixty years ago, and from aught that appears all the persons that had any actual knowledge of its location, are dead, and the necessity for a resort to this class of evidence seems to be as strong in this case as in any that can arise.

The defendant Willard further claimed on the trial below, that if he failed to establish the line as claimed by him, as the true line, still he had acquired a title up to that line by adverse possession, and insists that there was error in the charge of the court in respect to this claim.

In regard to this it is sufficient for present purposes to say that upon the evidence as detailed in the exceptions, we think the charge of the court was entirely correct.

Judgment reversed and case remanded.

Sewell Fullam v. Warren Adams.

Statute of Frauds. Contract. Attorney.

The defendant retained the plaintiff as his attorney in any litigation that might grow out of a conveyance to him by his brother, John Adams, who had failed; and in consideration of such retainer promised the plaintiff verbally to pay him one-half of a debt of three or four hundred dollars, due to the plaintiff from said John, and also promised to pay the plaintiff for his services, if he performed any. *Held*, That the defendant's promise to pay the debt of John Adams to the plaintiff was a promise within the statute of frauds, and not being in writing could not be enforced by action. That a verbal promise to pay the debt of another, where the original debt still subsists, is never legally binding, except where the promissor has received the funds or property of the debtor for the purpose of being so applied, so that an obligation or duty rests upon him, as between himself and the debtor, to make such payment, whereby his promise, though in form to pay the debt of another, is in fact a promise to perform an obligation or duty of his own.

A retainer of an attorney is a sufficient consideration to support a promise to pay such attorney a debt due him from another, if such promise be in writing.

Assumpsit. Plea, the general issue, and trial by jury, Windsor County, May Term, 1863, Barrett, J., presiding.

The plaintiff offered to prove by parol that the defendant applied to him, in February, 1851, and proposed to employ him as a lawyer to assist the defendant in all the suits which might grow out of the defendant's purchase of a farm and some personal property of his brother, John Adams, who had failed in business. That the defendant told the plaintiff if he would engage for him as his counsel in such suits as the defendant was interested in, he, the defendant would pay the plaintiff one-half of what said John was owing the plaintiff, amounting to some three or four hundred dollars, and reasonable fees and charges for his services. To this the plaintiff acceded. The defendant objected to proving by parol the agreement to pay one-half of the John Adams debt, it being within the statute of frauds. This objection was overruled by the court and the parol testimony admitted tending to prove the agreement,—to which the defendant excepted. Verdict for the plaintiff.

John F. Dean and *J. A. Wing*, for the defendant, maintained that the defendant's promise was within the statute of frauds and should have been in writing, and cited, besides cases cited in the opinion, *Jackson* v. *Rayner*, 12 Johns. 291; *Britian et al.* v. *Thrailkill*, 5

Jones' N. C. 329; *Mills* v. *Wyman*, 3 Pick. 207; *Chadler & Wife* v. *Davidson*, 6 Blackford, Ind. 367; *Rogers* v. *Rogers*, 6 N. C. 3; *Harrington* v. *Rich*, 6 Vt. 666; *Sinclair* v. *Richardson*, 12 Vt. 33; *Newell* v. *Ingraham*, 15 Vt. 422; *Smith* v. *Hyde*, 19 Vt. 54.

Sewell Fullam, plaintiff, *pro se.*, maintained that the defendant's promise was an original undertaking, and not within the statute of frauds, and cited *Cross* v. *Richardson*, 30 Vt. 641; *Skelton* v. *Brewster*, 8 Johns. 293; *Harrison* v. *Sautel*, 10 Johns. 242; *Gold* v. *Phillips*, 10 Johns. 412; *Chase* v. *Day*, 17 Johns. 114; *Olmstead* v. *Greenly*, 18 Johns. 12; *Conkey* v. *Hopkins*, 17 Johns. 113; *Gardiner* v. *Hopkins*, 5 Wend. 23; *Chapin* v. *Merrill*, 4 Wend. 657; *Packard* v. *Richardson*, 18 Mass. 122; *Templeton* v. *Bascom*, 33 Vt. 132.

POLAND, Ch. J. The defendant retained the plaintiff as his attorney, in any litigation that might grow out of a conveyance to him of certain property by his brother, John Adams, (who had failed); and, in consideration of such retainer, promised the plaintiff, verbally, to pay him one-half of a debt of three or four hundred dollars, due to the plaintiff from the said John, and also promised to pay the plaintiff for his services if he performed any. The defendant claims that his promise is supported by no legal consideration, and therefore does not bind him. It has long been the practice for members of the bar to receive fees for merely being retained by clients, and to charge for such retainers, without any special contract or promise to pay; and it has never been doubted in this state, to our knowledge, that lawyers were properly and legally entitled to make such charges. The amount of such charges has of course varied greatly, depending upon the amount and importance of the matter in controversy, and the professional standing of the counsel. Where, upon such retainer, the client expressly promises to pay a certain sum, we think it cannot be said to be a promise without consideration, and that such consideration must be regarded as sufficient and adequate to the extent of the sum he has promised to pay.

The important question in the case is, whether this promise bound the defendant, it not being in writing. It was in terms a promise to pay the debt of another, or a portion of the debt of another. The liability of John Adams for his debt to the plaintiff still subsisted precisely to the same extent as before. The plaintiff insists, that in

substance the defendant's promise was to pay him a certain sum for his retainer, absolutely, to be determined in amount merely, by reference to his debt against John Adams; that if John Adams should himself have paid the plaintiff the full amount of his debt, the plaintiff would still be entitled to recover the agreed price for his retainer from the defendant; and, that if the defendant first paid the plaintff one-half the amount of John Adams' debt, such payment would not operate to extinguish any part of the debt, as between the plaintiff and John Adams, but the plaintiff would still have the right to collect the whole debt from John. If the facts proved on the trial will justify this construction, then the case is clear of any question under the statute of frauds; it was no promise to pay the debt of another, but to pay his own debt. But, in our view, it is clear, this was not the real transaction between the parties, but it was in effect and purpose a contract by the defendant to guaranty, or become responsible for the payment to the plaintiff of one-half his debt against John Adams; that the defendant's liability to pay depended upon the continued existence of John Adams' debt, and if John Adams himself paid his full debt to the plaintiff, it would extinguish all claim of the plaintiff against the defendant; and if the defendant, under his contract with the plaintiff, had paid him one-half the amount of John's debt, it would operate to prevent the plaintiff from collecting of John more than the half remaining unpaid.

The defendant's promise to the plaintiff was, therefore, a promise to pay a pre-existing, and still subsisting, debt of another, founded upon the consideration of the plaintiff's retainer, by the defendant, as his counsel in his own personal matters; which we regard as sufficient to sustain the contract, if in writing.

The question, whether the defendant's promise was valid without writing, opens the door to an examination to an almost endless extent of judicial discussion and determination, both in England and this country, and we can hardly hope to do more than to add another decision to the long line, which may serve to perplex future explorers into the true extent and meaning of this section of this ancient statute. There are some things that have always been undisputed in all the cases arising under it; one is, that the promise must be supported by a valid consideration. This was so before the

statute, and the statute added the further requirement that the promise should be in writing. In the case of a promise to pay a pre-existing debt of another, it has always been held that there must be a new or further consideration to support it; that the original consideration upon which the debt rested was not enough, and could not be used to support the new promise.

But it was never considered necessary that the new consideration should be one that was beneficial to the promissor, in order to make his promise binding, if in writing; if it was, or might be detrimental to the promissee, it was enough, like forbearance of his debt.

So too, the promises mentioned in this section of the statute, are those of suretyship, or guaranty for the debt of another, which still subsists against him; for if the effect of the new promise or contract be to discharge the original debt, the promissor becomes the sole debtor, and there is no debt of another to which his promise is collateral, therefore such promise is not within the purpose and spirit of the statute, and need not be in writing. In the present case, as before said, we regard the defendant's promise as one for the payment of a pre-existing and still subsisting debt of another, and therefore within the terms of the statute; still it does not follow that he is not bound by it, though not in writing, for it is well established that a parol promise to pay the debt of another, which still subsists in full force against him, in favor of another, may be binding upon such promissor.

This statement seems to be almost a direct contradiction of the express language of the statute; but it is established by repeated decisions in England, in the American courts generally, and by several decisions in this state. The decisions are contradictory enough, as to what is necessary, in order to make such a promise binding, but all agree that there may be a state of facts which will make it so. What is that state of facts which will take a parol promise to pay the still subsisting debt of another out of the reach of the statute? and do the facts of the plaintiff's case make it one of that class? Many attempts have been made by different judges and law writers, to lay down a precise rule or definition by which it could be at once determined, whether such promise was or was not within the statute, but these rules have given rise to the same conflict of debate

and decision which attended the original rule of the statute itself. In an early decision in this country, *Leonard* v. *Vredenburgh*, 8 Johns. 29, Chancellor KENT, then Chief Justice, divided the cases under this section of the statute of frauds into three classes. His third class, in which the plaintiff claims to include his case, is as follows: "Where the promise to pay the debt of another arises out of some new consideration of benefit or harm moving between the newly contracting parties. This class he says are not included within the statute. The very general language in which this rule is laid down, and the great authority given to it by the high character of its author, induced many decisions in this country which were directly in the teeth of the statute, in both its letter and spirit. Indeed, at one period the decisions seemed to go to the extent of holding, that if the new promise was suported by an adequate legal consideration, it was not within the statute, which was just equivalent to denying the statute any force whatever. In *Farley* v. *Cleveland*, 4 Cow. 432, Ch. J. SAVAGE attempted an improvement on this definition, so as to make it more precise and accurate. Speaking of Chancellor KENT'S third class, he says: "in all these cases founded on a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery." In a very recent case in the same state in the court of appeals, this subject received great consideration: *Mallory* v. *Gillett*, 21 N. Y. 412. The plaintiff had made repairs to the amount of $125., upon a canal-boat belonging to one Haines, and had the boat in his possession, under his lien for the repairs, and refused to surrender the boat until the amount due him for the repairs was paid. In consideration that the plaintiff would deliver up the boat to Haines, the defendant promised by *parol* to pay the plaintiff for the repairs made on the boat. The action was brought on this promise, and the defendant claimed he was not bound, because his promise was not in writing. Five of the judges held the promise not binding, because not in writing, while the other three held, that under the decisions in that state, following the rule laid down by Chancellor KENT, the promise of the defendant was not within the statute, and that the defendant was legally bound,

The majority held the defendant's promise to be not binding without writing, because the consideration for it (the surrender of the plaintiff's lien on the boat) was to Haines his debtor, and so was not one that inured to the advantage of the defendant. The majority opinion was delivered by COMSTOCK, Ch. J., and contains a most able and exhaustive examination of the cases on this branch of the statute.

He endeavors also to reduce the promises for the debts or defaults of others, which are, or are not, within the statute, to classes. Among those not within the statute, he brings the following:— "Where, although the debt remains, the promise is founded on a new consideration, which moves to the promissor. This consideration may come from the debtor—as when he puts a fund into the hands of the promissee, either by absolute transfer, or upon a trust to pay the debt,—or it may be in his hands charged with the debt as a prior lien, as in the case of *Williams* v. *Leper*, and many others. So the consideration may originate in a new and independent dealing between the promissor and creditor, the undertaking to answer for the debt of another being one of the incidents of that dealing. Thus A., for any compensation agreed on between him and B., may undertake that C. shall pay his debt to B." In this opinion Ch. J. COMSTOCK endeavors to show, that both upon principle and by a great majority of adjudged cases in New York, and elsewhere, where a creditor has a security of any sort in his hands for the payment of his debt, and surrenders it to his debtor upon the promise of a third person to pay his debt, such promise is within the statute, and not binding unless made by writing; but if such security be surrendered to the party making the promise, for his own benefit and advantage, the promise, though by parol, is not within the statute, and binds the promissor. Though there are adjudged cases to the contrary, it is shown clearly, as we think, that by the great majority of decisions, these conclusions of the majority of the court are fully sustained. But wherein consists the difference in the two cases, so that in one the parol promise is binding, and not in the other? The promise in both is to pay the debt of another, for which he still continues liable. The surrender of the security is equally a detriment to the creditor in both cases, and in either case forms an

ample consideration for the new promise, if in writing. An examination of some of the cases will, we believe, develop the reason, and the true principle upon which the distinction is made. It has been often decided, that where the purchaser of property promises to pay the price to a creditor of the vendor, such promise is binding, though not in writing, and the vendor still remains liable for the debt: *Barber* v. *Bucklin*, 2 Denio, 45; *Dearborn* v. *Parks*, 5 Greenl. 81; *Farley* v. *Cleveland*, 4 Cow. 432, are samples of this class of cases. In some of these cases it is said, the promise is not within the statute, because in substance it is a promise to pay the promisor's own debt for the purchased property, and that although the fulfilment of his promise to pay his own debt, has the effect to pay the debt of another, it does not bring his promise within the statute, as this effect is incidental, and not the principal object and purpose of the promise. And where a debtor transfers funds or property to another for the purpose of paying his debt, and the person thus holding the debtor's funds or property promises the creditor to pay his debt, such promise is held good, though not in writing. This was held in this state in *Wait* v. *Wait*, 28 Vt. 350, and has also been decided in a subsequent case in Rutland county not yet reported, and many cases in other states support the same doctrine. We apprehend the true principle why the promise to the creditor is valid without writing, is the same in both these classes of cases. In both, the party making the promise, holds the funds of the debtor for the purpose of paying his debt, and as between him and the debtor, it is his duty to pay the debt, so that when he promises the creditor to pay it, in substance he promises to pay his own debt, and not that of another; and though the debtor still remains liable for the debt, his real relation is rather that of a surety for the party whose duty it is, and who has promised to pay his debt, than of a principal for whom the other has become surety or guarantor. He holds a fund in trust, under a duty to pay it to the creditor, and he makes an express promise to perform it. In such case, it is no violation of the spirit of the statute, to hold such promise an original one, and not necessary to be in writing. The cases which decide that where a creditor holds a security for his debt, and surrenders it to a third person, for his own benefit, upon his promise to be an-

swerable for the debt, stand really upon the same substantial principle. The early case of *Williams* v. *Leper*, 3 Burr. 1886, is the starting-point of all this class of cases, and the decision seems to be put exactly on this ground.

Taylor was the tenant of the plaintiff, and in arrear for his rent; he was insolvent, and conveyed all his effects for the benefit of his creditors; they employed Leper, the defendant, as a broker to sell them, and he advertised them for sale. On the morning of the sale the plaintiff came to the house to distrain the goods for his unpaid rent, whereupon the defendant promised the plaintiff if he would not distrain he would pay the rent due him. The plaintiff desisted from distraining, and allowed the defendant to sell the goods. It was held by the court, that his promise to pay the plaintiff was valid, though not in writing. Lord MANSFIELD said: "The *res gestæ* would entitle the plaintiff to his action against the defendant. The goods are the fund; Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien." The decision went clearly upon the ground, that as the plaintiff had the prior lien on the goods for the payment of his rents, and surrendered it to the defendant on his promise to pay the rent, it became a trust in his hands for the payment of the plaintiff's debt, and his promise was not that of a surety or guarantor for Taylor, but for the performance of his own duty. This case was followed by *Castling* v. *Aubert*, 2 East, 325. The plaintiff was under liabilities for one Grayson, and held certain policies of insurance as security therefor. The defendant was the agent of Grayson for the management of his insurance affairs, and, a loss having happened, the defendant needed the policies in order to get the money, and applied to the plaintiff to surrender them to him, which the plaintiff did upon the defendant's promise to pay the acceptances for which the plaintiff was liable. This promise was not in writing. It was claimed that under the statute of frauds, the promise was not binding, but the court held that it was, and said it was rather a purchase of the securities which the plaintiff held in his hands, and that the defendant had in contemplation not principally the discharge of Grayson, but the discharge of himself. *Edwards* v. *Kelly*, 6 M. & S. 204, and many other English cases, follow in the same line of decision, and

the substance of all of them is that in such case the party making the promise is liable, because by the arrangement he becomes the holder of a fund or security which was appropriated to the payment of the debt, and clothed with a duty or trust in respect thereto, which the law will enforce in favor of the party to whom the promise is made. In all this class of cases the promise is upon a new consideration which moves to the promissor, and, therefore, they come within all the definitions or rules before mentioned; but is it true that in every case where there is a new consideration moving to the promissor, the promise to pay the debt of another is good, without writing? Especially, is the statement quoted before from Ch. J. COMSTOCK, "that A., for any compensation agreed on between him and B., may undertake that C. shall pay his debt to B.," good without writing? That is the precise proposition the plaintiff claims to sustain in this case, and the case put by him in argument, of a parol promise to pay, or to guaranty the payment of a debt of another for a hundred or a thousand dollars, in consideration of ten dollars paid the promissor by the creditor, illustrates the proposition exactly. It is a new consideration moving between the newly-contracting parties, and for the benefit of the party making the promise, and hence clearly within the terms of the rule. But we have found no case among the multitude on the subject, which supports the proposition to this extent; and where the promise is a mere contract of guaranty, we think it comes within the statute, though a distinct consideration therefor be paid directly to the party making the promise.

The subject is well illustrated by the decisions in the case of factors selling goods under a *del credere* commission, where the agreement is by parol. It was at one time held, that the factor's agreement to guaranty his sales, was not binding unless in writing; that it was a promise within the statute of frauds. But the contrary is now firmly established both in England and this country: *Couturier* v. *Hastie et al.*, 16 Eng. L. & Eq. 562; *Wolff* v. *Koppel*, 5 Hill, 458; *Swan* v. *Nesmith*, 7 Pick. 220. If it be true that a new consideration moving directly between the parties, and to the promissor, is sufficient to sustain a verbal promise to pay the debt of another, it would seem there never could have been any question about the

statute of frauds, for the payment of the additional per cent. for the guaranty would always have been sufficient. But the cases which hold the factor bound by his verbal agreement are placed upon no such basis. In the case from 5 Hill, COWEN, J., says: "The implied promise of the factor is merely that he will sell to persons in good credit at the time, and in order to charge him negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales except to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the *onus* of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this after all but another form of selling the goods? Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt or a duty which obliges him to see the money paid. The debt or duty is his own, and arises from an adequate consideration." Baron PARKE, in the English case cited, upholds the parol promise of the factor upon substantially the same ground with Judge COWEN, and he adds: "Doubtless, if they had for a per centage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect to that employment." This is a clear denial of the proposition, that a new consideration moving from the creditor to the guarantor takes the guaranty out of the statute, and all the cases proceed upon the ground, that the factor's promise in such case stands upon the consideration of his own duty and obligation, growing out of his employment. In the case of *Anderson* v. *Davis*, 9 Vt. 136, Lamb had contracted to erect a building for the defendant, and had partially completed it when he was taken sick, and the work ceased. The plaintiff had worked for Lamb on the building, and, in consideration that the plaintiff would go on and complete the building, the defendant promised to pay him for his future services, and also for his previous labor. It was held that this promise to pay for the previous labor, done for Lamb, was not binding, not being in

writing. It was conceded, that the consideration was sufficient to sustain the promise, provided it had been in writing. But here was a new consideration moving from the promissee to the promissor. In *Loomis* v. *Newhall*, 15 Pick. 159, the plaintiff had boarded the defendant's son, for which the son was liable; and in consideration that the plaintiff would continue to board the son, the defendant promised the plaintiff to pay him for both the past and future board. It was held that the promise to pay for the debt of the son for the past board was within the statute, and therefore not binding. In this case also it was conceded by the court that the consideration was ample to sustain the promise for the whole, if it had been in writing. This was a case of a new consideration between the parties, the furnishing future supplies to the son at the defendant's request. The court further decided in this case, that although the defendant's promise to pay for the future supplies would be good without writing, still as the contract was entire and not binding for the debt already accrued, it was invalid also for the future. In the case of an illegal contract, or one founded on an illegal consideration, this was undoubtedly correct, but parol contracts or promises within the statute of frauds are not illegal or void; the statute simply takes away the right to enforce them by suit. This was held differently in *Anderson* v. *Davis*, and rightly, as we think.

These cases are cited to show that it is not true that in every case where the promise is founded upon a new consideration moving wholly between the parties to the guaranty, the promise is taken out of the statute. It depends upon the transaction itself, the general object and purpose, or, as Lord MANSFIELD expressed it, on the *res gestæ*. If the leading purpose and object be to guaranty, or become responsible for the payment of a third person's debt, then the promise is within the statute although it may be founded upon a consideration directly between the parties. It is almost impossible to imagine a case where a promise to pay the debt of another, for which he remains liable, upon a consideration moving wholly from the creditor and in which the debtor has no concern; where the leading object and purpose can be any other than to make the promissor the surety or guarantor of the debt. In such case no duty or

obligation is imposed on the promissor as between him and the debtor; his obligation is wholly to the creditor, and rests entirely upon his promise or contract with him. It is scarcely reasonable to suppose one would part with a consideration belonging wholly to himself, where the value was equal to the amount of a debt due him from another, even to obtain the promise of a third person to pay it. If the consideration for the promise is much less in value than the amount of the debt, it would afford a strong presumption that reliance was placed to some extent upon the chances that the debtor would pay it himself, and therefore the promissor not be called upon at all upon his undertaking. But the strong reason given why it is not a guaranty and a collateral promise is, that it should be treated as a purchase of the consideration, and when payment is made it is really paying for property purchased, or whatever else the consideration may be. But if so, then when he has made the payment he has only paid for what he received of the creditor, and the debt is just as much due as before, and may be collected by the creditor of the debtor, and neither would payment of the original debt by the debtor afford any protection to the party making the new promise from paying for what he has purchased of the creditor. But if the parties in entering into the new contract really contemplate a sale of property from one to the other, or the performance of services by one for the other for a stipulated price to be paid, it is scarcely comprehensible why the contract should assume the form of a promise to pay the debt of another, and especially where the amount of such debt is unknown and unliquidated. As stated earlier in this opinion, if this was the real transaction it would have nothing to do with the statute, because really it would have nothing to do with the debt of another. But in such case the purpose and intent is clear to enter into a contract to guaranty or answer for the debt of another, and what is paid or done as a consideration is for that purpose simply, and to call it a purchase and sale is a simple perversion of those terms. If the real substance of the promise be to perform some duty or obligation of the party making the promise, it is not within the statute, though in form it is a promise to pay another's debt, and the result of its performance may effect the payment of the debt of another. And we believe it will be found

that in all the cases now regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promissor held in his hands funds, securities or property of the debtor, devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty, growing out of the receipt of such fund.

In support of these views we refer further to *Nelson* v. *Boynton*, 3 Met. 396; *Kingsley* v. *Balcom*, 4 Barb. 131, and Browne on Statute of Frauds, ch. 10. In the present case we regard the defendant's promise as essentially a contract of guaranty of one-half the amount of John Adams' debt, and though founded upon a sufficient consideration moving directly to the defendant, it was a promise within the statute, and not being in writing, not enforceable at law. Where a promise to pay the debt of another is founded upon the consideration of property sold by the debtor to the promissor, to be paid for to his creditor, if payment is not made accordingly, and the debtor is compelled to pay his debt, he is entitled to have pay for his property sold. If he places property or funds in the hands of another to pay his debt, and it is not done, he is entitled to his property again. If a creditor holds securities of his debtor of any sort for the payment of his debt, and surrenders them to a third person upon his promise to pay the debt, and he fails to do so, and the debtor pays his own debt, he is entitled to have his securities returned to him, or applied for his benefit. In this case the defendant received nothing, and held nothing in his hands, for the payment of John Adams' debt. If John Adams paid the debt to the plaintiff, the defendant was under no liability to either of them for anything he had received. His obligation to the plaintiff began with, and rested solely upon his promise. It is a naked promise to pay the debt of another, and within the statute, if one can be, where it is founded on a new consideration moving to the promissor, which we have tried to show may be the case. It is claimed that several decisions in this state support the plaintiff's right to recover in this case, and it is true that in some of our cases the same general language is used that has already been referred to; that when the promise is founded upon a new consideration moving between the

parties, it is not within the statute; but an examination of the cases, we believe, will show them all to have been correctly decided, even in the view we have taken of the principle governing such cases. *French* v. *Thompson*, 6 Vt. 54: The plaintiff had been guardian of one Hurlbut, and held securities and property belonging to his ward. He resigned his guardianship, and the defendant was appointed guardian in his place. The defendant promised the plaintiff, that if he would deliver to him the securities and property of his ward, he the defendant would pay the plaintiff's account for his payments and expenditures while acting as guardian. The promise, though not in writing, was held good. *Lampson* v. *Hobart*, 28 Vt. 697: The plaintiff and defendant were creditors of the same debtor. The plaintiff was about to attach the debtor's property, when the defendant promised, that if the plaintiff would desist making his attachment, and allow the defendant to attach the property upon his debt, he would pay the plaintiff's debt. The plaintiff thereupon desisted, and allowed the defendant to take the debtor's property. The court treated this as a case where the plaintiff had obtained a security for his debt, and in consideration of its surrender to the defendant, he made the promise. The promise was held binding, though not in writing. If there was any error in the case, it was in treating the plaintiff as having already obtained a security on the property, but that does not vary the principle of the decision. *Cross* v. *Richardson*, 30 Vt. 641: The plaintiff had an attachment on certain logs of his debtor Brown, and had trusteed certain debtors of Brown. In consideration that the plaintiff would release his attachment on the logs, and release the trustees, so that the defendant could bid off the logs at a sheriff's sale, and have them sawed by the trustees, he promised the plaintiff to pay him $100. on Brown's debt. This promise was held good, though by parol merely.

Templeton v. *Bascom*, 33 Vt. 132: The plaintiff had a debt against the defendant's father, who had died, leaving ample property for the payment of his debts. The defendant was the sole heir to his father's estate, and all the property was in his hands In consideration that the plaintiff would not proceed to take out

administration, and enforce payment of his debt out of the estate, the defendant promised to pay it. This was held not within the statute, though by parol. In this case the plaintiff not only relinquished his right, in favor of the defendant, to the funds in his hands, to which he had the right to look for payment, but his omission to proceed against them operated as a discharge of the debt itself.

But in all these cases the plaintiff surrendered, and the defendant received, a fund or a security charged with the payment of the plaintiff's debt, and all come within the class of *Williams* v. *Leper*, and *Castling* v. *Aubert*, and upon the same ground with those were properly held not to fall within the statute. We know of no case in this state where the parol promise of one to pay the debt of another, has been upheld upon any other consideration than the receipt of some fund or other security, either from the debtor or creditor, charged with the payment of the debt, so that a trust or duty was created thereby to pay the debt, and so that in making the payment of the debt he was really fulfilling an obligation of his own. When carried further than this, the statute is really repealed. If it be true, that "A., for any compensation agreed on between him and B., may undertake that C. shall pay his debt to B.," as laid down by Ch. J. COMSTOCK, and such promises held good without writing, then truly the statute of frauds and its labor have been in vain. If parol evidence can be made sufficient to charge one man with the payment of another's debt, however large, by proving a promise, and a consideration of a pepper-corn, or a day's work, or some other of equal value, every beneficial purpose of the statute is gone. No better scheme could have been devised before the days of the statute of the 29th of Charles the 2d, to establish a claim against a man by false testimony, than this would be. The statute was passed by reason of the strong temptation to make others responsible for the debts of irresponsible and insolvent debtors, and the facility afforded by the testimony of corrupt witnesses to establish such contracts, if allowed to be proved by verbal testimony; hence, the evidence of any such promise by a third party was required to be in writing. But if the statute can be avoided by find-

ing a corrupt witness to swear to such promise, and in addition to anything paid or done which in law could constitute a consideration to the party himself, the use for such witnesses is by no means at an end. The decisions have gone quite far enough, in holding such parol promises binding when made upon the consideration of having received, or holding the debtors funds or property for that purpose.

Judgment reversed, and a new trial granted.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF CHITTENDEN,

AT THE

JANUARY TERM, 1865.

PRESENT:

HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

BENJAMIN FAIRCHILD *v.* R. M. LAMPSON, AND N. W. FAIRCHILD *Trustee*, AND A. E. COLTON *Claimant.*

Trustee Process.

A joint debt cannot be the subject of trustee process in a suit against one of the parties alone to whom the debt is due; and a claimant whose claim is not valid may properly raise this objection to the trustee's being holden.

TRUSTEE PROCESS. The commissioner reported that, September 1st, 1856, N. W. Fairchild, trustee in this case, executed and delivered to W. F. Colton and R. M. Lampson his promissory note for $325. payable to said Colton & Lampson or order. Prior to September 1st, 1859, this note passed into the possession of the claimant, A. E. Colton, brother of W. F. Colton, and on that day, on application of A. E. Colton, N. W. Fairchild gave a renewal note, paya-

ble to W. F. Colton & R. M. Lampson or bearer, and took up the $325. note. April 28th, 1862, A. E. Colton sued out a writ in his own name against N. W. Fairchild on the renewal note and another note, and caused his real estate to be attached. Prior to May 12th, 1862, Fairchild saw the record of this attachment of his farm in the town clerk's office, and therefrom learned that A. E. Colton had sued him upon said two notes. On the 16th May, 1862, the writ in this trustee suit was served on said N. W. Fairchild. Said renewal note was when given and is still the property of the payees named therein, W. F. Colton and R. M. Lampson, in equal proportions, and no part of it has ever been paid.

The commissioner further found that Benjamin Fairchild, the plaintiff, before and at the time of the commencement of this suit knew from the record of attachment in the town clerk's office that A. E. Colton had commenced his said suit against N. W. Fairchild, but did not find that Benjamin Fairchild at the time his suit was commenced had notice that A. E. Colton claimed to own the notes on which said suit was brought. But on or soon after the 10th of March, 1864, both Benjamin Fairchild and N. W. Fairchild had learned, not from A. E. Colton, but by report, that said A. E. Colton claimed to own the said notes.

The commissioner found that the claimant, A. E. Colton, was not the *bona fide* owner of the notes in question at the time the writ was served upon the trustee; and that the trustee prior to the service upon him had not been legally notified of the sale or transfer of said notes by Colton & Lampson to the claimant or anybody else.

Upon these facts the Commissioner adjudged the trustee chargeable. The claimant excepted to the decision of the commissioner, and insisted that the trustee should be discharged.

Upon the commissioner's report the court at the September Term, 1864, PIERPOINT, J., presiding, adjudged the trustee chargeable,—to which the claimant excepted.

Dewey & Noble, for the claimant.

The maker of the $383.50, note is not chargeable for one-half the amount due on it, as trustee of the defendant Lampson.

The simple question presented by the facts found by the commissioner in his report is this: Can the promissor, in a promissory note

which is payable to two joint payees and owned by them in equal proportions, be charged as a trustee of *one* of the payees for one-half of the amount of the note, in a suit against that payee *alone?* The case of *Hanson* v. *Davis* and *Hall Trustee*, 19 N. H. 133, is an authority precisely in point, and is decisive of the question. That case lays down the rule, that a promisor, under such circumstances, cannot be charged as trustee.

H. B. Smith, for the plaintiff, maintained that the finding of the facts by the commissioner is conclusive. *Scofield* v. *White's Trustees*, 29 Vt. 330; *Lovejoy* v. *Lee & Trustee*, 35 Vt. 430; Laws of 1853, §7, p. 11; *Towne* v. *Leach & Trustee*, 32 Vt. 747; and that the judgment of the county court was correct. *Bartlett* v. *Wood & Trustee*, 32 Vt. 372.

ALDIS, J. N. W. Fairchild owes Lampson & Colton a note for $383.50. Lampson & Colton own the note jointly,—each owning an undivided half. Can the plaintiff hold N. W. Fairchild as the trustee of Lampson alone?

1. The trustee strictly speaking has no credits of Lampson's in his hands. What he has is a fund belonging to Lampson & Colton, jointly. The plaintiff has no right to take a judgment against Fairchild for credits belonging to Colton. He cannot take a judgment for the whole debt due Lampson & Colton.

If he take a judgment for anything it must be for Lampson's undivided half; and as we have no way to reach that but by a judgment for dollars and cents, the judgment if any must be for half the amount of the debt. If such a judgment be rendered and the plaintiff take out execution and collect it, one half of the sum so collected must be held as belonging to Colton. He has the right to insist that half shall be paid to him as fast as it is paid by his debtor. Shall the plaintiff then be allowed another judgment and execution for his half unpaid to him?

So Colton has the right to sue for and collect his demand at once. He cannot get his half without collecting the whole. Shall he be impeded by having a litigation between the plaintiff and Lampson suspend the collection of his debt? Then if he exercise his right and collect the whole, shall Fairchild who has paid the whole be still liable as trustee?

As our statutes now stand the court has no power to remedy these inconveniences, nor could we prevent this process from injuriously affecting Colton if we were to apply it to this debt. Legislation might regulate it. The courts of New Hampshire have so ruled. *Hanson* v. *Davis*, 19 N. H. 133. See also 32 Vt. 747.

The plaintiff claims that the decision in *Bartlett* v. *Wood & Trustee*, 32 Vt. 372, that the undivided half of a debtors interest in a chattel in the hands of the trustee may be taken on trustee process, involves the principle for which he here contends. We think not. There is an obvious difference between the rights of the joint owner in a chose in action and a chattel in possession of another. The former must be collected and reduced to possession; it is not to be sold. We have no statute for that.

But the trustee of the chattel has only to deliver it to the sheriff and he sells the undivided half. The rights of the owner of the other half cannot be affected by such sale.

It is only as to his right to possess that his interest can be at all affected, and the decision referred to carefully limits the liability of the trustee to such chattels only as are in his possession, and decides nothing as to the effect of the other joint owner's taking the chattel from the possession of the trustee.

2. It is insisted that the claimant, Addison E. Colton, has no *status* in court by which he can raise the foregoing objection. But it is to be noted that the trustee is held not liable because the joint debt cannot be the subject of trustee process in a suit against Lampson alone; because W. F. Colton's rights may be injured, and not because Addison E. Colton has any claim.

In such a case Addison E. Colton as the holder of the note may object to a judgment not on his own account, but for W. F. Colton. Indeed, where the trustee is to be discharged because the debt he owes cannot be the subject of trustee process and a judgment might enure to the injury of parties not before the court, it would be the duty of the court upon knowledge of the facts to withhold judgment.

Judgment reversed as to trustee and judgment that the trustee is not chargeable.

HENRY STANTON, *Appellant*, *v.* ESTATE OF E. G. STANTON.

Statute of Limitations. Promissory Note.

The plaintiff's note in which he promised to pay S. "four hundred dollars in produce or wood from the farm on demand as he may want to use the same," had run for over twelve years without any demand having been made. *Held*, that it was not barred by the statute of limitations.

Where the instrument itself indicates that the calls for payment are to be indefinitely prospective, and to be made as may suit the wants and convenience of the payee, there is no ground furnished upon which the law can assume any fixed point, as a limit to reasonable time for making a demand, and therefrom give operation to the statute of limitations.

APPEAL from the probate court. This case was heard upon a case stated, hereto annexed. The court, September Term, 1864, PIERPOINT, J., presiding, *pro forma* rendered judgment for the defendant, affirming the judgment of the probate court,—to which the plaintiff excepted.

Agreed case:—It is agreed that the annexed note was executed and delivered by the plaintiff to the intestate at its date for full and valuable consideration; that it has never been paid nor has any part of it; and that no demand or request for its payment was ever in fact made.

The maker of the note sold and conveyed his farm about the year 1857, retaining however some farming lands, which he still owns.

If, upon these facts the court is of opinion that the note is not barred by the statute of limitations or otherwise, the judgment of the probate court is to be affirmed; but if the court shall adjudge that the note is so barred, the amount of it is to be deducted from the amount allowed by the commissioners, and probate judgment affirmed for the balance.

The intestate died September 12th, 1862.

Copy of the note:—$400.—For value received I promise to pay E. G. Stanton, four hundred dollars in produce or wood from the farm on demand as I may want to use the same, on interest.

Painsville, July 27th, 1850.

H. STANTON,

Russell S. Taft, for the plaintiff.

The law in this state is well settled that contracts for the delivery of specific articles having the form of promissory notes are entitled to all the properties of such instruments, except, perhaps, a lack of negotiability, and after such notes become due, are treated as notes for so much money, and consequently in this case after a reasonable time for demand had elapsed the note of the plaintiff became a money note and the statute commenced running. *Bragg* v. *Fletcher et al.*, 20 Vt. 351; *Perry* v. *Smith*, 22 Vt. 301; Angell on Lim., 94; *Doe* v. *Thompson*, 2 Foster, 217; *Stafford* v. *Richardson*, 15 Wend. 302; *Lyle* v. *Murray*, 4 Sandf. 590; *Codman* v. *Rogers*, 10 Pick. 112; *Laforge* v. *Jayne*, 9 Penn. 410; *The Pittsburgh & Connelsville Rail Road Co.* v. *Byers*, 32 Penn. 22; *Morrison's Adm'r* v. *Mullin*, 34 Penn. 12.

Hard & Ballard, for the defendant.

The note is not barred by the statute of limitations. The general rule is, that the statute commences to run against a claim only from the time when the creditor has a perfect and complete right to commence an action. If a demand is necessary to perfect a claim, the statute only runs from the time when a demand is made. *Staniford* v. *Tuttle*, 4 Vt. 82; Angell on Lim. 37; Chitty on Con. (10th Am. Ed.) 917; 2d Parsons on Con. 370.

In the case of promissory notes payable on demand in *money*, the rule is that the payee's right of action is complete from the time of the delivery of the note, hence the statute commences to run from that time. *Kingsbury* v. *Butler*, 4 Vt. 458.

But in the case of promissory notes payable in *specific articles*, if payable generally on demand, the authorities are, that a demand is necessary before the payee's right of action is complete, and hence in such cases the statute commences to run only after a demand has been made. *Elkins* v. *Parkhurst*, 17 Vt. 105; *Russell* v. *Ormsbee*, 10 Vt. 274; *Chandler* v. *Windship*, 6 Mass. 310; *Lobdell* v. *Hopkins*, 5 Cowen, 516; *Stevens et al.* v. *Adams*, 45 Maine, 611; Chipman's Contracts, 49, 228; *Lincoln* v. *Purcell*, 2 Head. (Tenn.) 20 U. S. Dig. 644.

The language of the note strongly indicates that the parties in-

tended that a demand should be made before any payment was expected.

BARRETT, J. The only question made in argument is whether upon the facts agreed the note in question is barred by the statute of limitations.

The ground on which it is claimed that the note is barred by the statute is, that it was the duty of the payee to demand the pay in a reasonable time; that, in the absence of any proof upon the subject, the law will assume six years as the limit of such reasonable time, and that, in case no demand is made within that period, the statute will begin to run at the expiration of that period.

In the view we take of this case, it seems unnecessary to enter upon a discussion of it in the light of the authorities cited and relied upon by the counsel for the plaintiff; for, though those cases should be regarded as a true exposition and just application of the law, it seems to us that this case, upon its facts, does not fall within them.

The note in this case bears upon its face evidence of the understanding and intention of the parties that the payment was to be called for and made, along from time to time, and when the payee might want to use produce or wood, either or both. It is plain that there is a clerical mistake in using "I" instead of "he" preceding the words "may want to use," &c.

This being so, it is impossible to hold, upon any plausible reason, that it stands upon the same ground, and subject to the same consideration, as if payable on demand. If payable on demand, there might be good warrant for holding, in the absence of any showing of reason for neglecting to make a demand for six years or more, that such delay was unreasonable, and that the statute should begin to run at the expiration of six years. But when the instrument itself indicates that the calls for payments were to be indefinitely prospective, and to be made as might suit the wants and convenience of the payee, there is no ground furnished upon which the law can assume any fixed point, as a limit to reasonable time for making a demand, and therefrom give operation to the statute of limitations.

If the plaintiff would render effective in his own behalf his claim that the statute should begin to run from the expiration of reasonable time for making demand of payment, it would be incumbent on

him, either to show, as matter of fact, when such reasonable time expired, or to show a state of facts upon which the law would assume a limit to such reasonable time. For the want of this in the present case, the court are unable to hold that the note became barred by the statute of limitations.

Upon the agreed case, therefore, effect is to be given to the note according to the judgment of the probate court.

We have designedly omitted a discussion, or indicating any opinion upon several points made in the argument by the learned counsel for the parties, regarding it more proper and more serviceable to the interests of jurisprudence to reserve that labor for cases in which it becomes necessary for their legitimate disposition.

Judgment affirmed.

Lydia C. Meech *v.* The Estate of Ezra Meech.

Appeal. Practice. Will. Homestead. Referee.

If an appeal from the probate court to the county court is entered without giving to the appellee the requisite notice, the practice is not to dismiss the appeal, but to continue the case and give the notice,—the same as under the Probate Act of 1821.

The husband cannot by will devise the homestead right away from his wife and minor children.

No distinction can be made as to the rules applicable to dower and homestead, when the question of election between them and a will arises.

The testator devised by will to his wife for life four acres of land which included the family mansion and grounds. Then a larger tract comprising the four acres within its boundaries is devised in fee to a son, Ezra, with this clause appended to the description:—"excepting from the lands herein devised to Ezra the life estate which I have given to my wife, in about four acres thereof, and the lands and buildings standing on the four acres." The house on the four acres was the homestead, from which the widow's homestead must be taken if she have any. The will stated that the provision for the widow was to be in lieu of dower, and it is *held*, that it was plainly intended to be in lieu of homestead also.

Where parties present to the court an agreed statement of facts, a referee can only find such facts as are the legal result of the facts agreed upon, or as are naturally and legally deducible from them.

Meech *v.* Est. of Meech.

THIS was an appeal from the judgment of the probate court setting out a homestead to the appellee. When the appeal was entered the appellee moved that it be dismissed because no notice was ever given to her that an appeal had been prayed for or allowed. Nor was any citation ever served upon her to appear in court to attend to the same agreeably to the statute in such case made and provided.

The court overruled the motion, to which the appellee excepted.

The cause was then referred to Hon. Milo L. Bennett.

It appeared from an agreed statement of facts submitted to the referee that Ezra Meech died September 21st, 1856, leaving surviving him Lydia Meech (the appellee) his widow of a second marriage, two children and three grand-children, and that he left a will dated February 22d, 1855, and two codicils dated respectively July 14th, 1855, and May 6th, 1856, all which were duly admitted to probate in the probate district of Chittenden, December 1st, 1856, from which decree an appeal was taken by Lydia C. Meech, but the decree establishing said will and codicils was duly affirmed and certified. By the will it was, among other things, provided as follows:

"I will and bequeath to my beloved wife, Lydia C. Meech, during her lifetime, the use of my house and about four acres of land, and the buildings thereon, being the garden and the grounds around the house, which are enclosed by cedar trees. * * * I also give and bequeath to her the following annuity, during her natural life, viz: nine hundred dollars in money, * * * and I charge upon all my real estate, hereinafter devised to my children and grand-children, the payment of such annuity to my beloved wife, in the manner and proportions hereinafter specified."

"I further give and bequeath to my said wife, one thousand dollars, to be paid to her by my executors within thirty days after my decease, and I direct that the money part of said annuity, viz: nine hundred dollars per annum, shall be paid to her as follows, viz: four hundred and fifty dollars in one year after my decease, and four hundred and fifty dollars at the expiration of every six months thereafter, during her natural life, and the devise and bequests herein made to my said wife, are in lieu of dower."

To Ezra Meech, Jr., (the appellant,) the will then devises in fee two certain parcels of land, the second of which is described by

boundaries which extend around and embrace the four acre parcel, the use of which for her lifetime was, as above, devised to the said Lydia C. Meech; which devise to said Ezra, Jr., concludes as follows: "Excepting from the lands herein devised to said Ezra, Jr., the life estate which I have given to my wife, in about four acres thereof, and the house and buildings standing on said four acres."

"And the said lands so devised to my son, the said Ezra, Jr., are given upon the express condition that he pay, or cause to be paid to my said wife, the sum of four hundred dollars annually, during her lifetime, in semi-annual payments, * * * which said sum of four hundred dollars, annually to be paid to my said wife, by the said Ezra, Jr., as above stated, I charge upon the said lands so given and devised to the said Ezra, Jr." Then followed further charges upon Ezra in behalf of Lydia C. Meech; and provisions to the other child and grand-children.

The will made disposition of all the estate of the deceased, amounting to more than $100,000.

Immediately after the judgment in the county court establishing the will, and before any application for setting out a homestead to Lydia C. Meech, she accepted the devises, bequests and legacies in the will given to her.

The homestead set out by the commissioners appointed by the probate court is part of the dwelling house, &c., on said four acre parcel.

The referee reported that he inferred and found from these facts that it was the purpose and intention of Ezra Meech in making the provision in his will for the support and maintenance of his widow Lydia C. Meech, that it should be a full and final provision for her, and was intended by him to be in lieu of all other claims which she as his widow could have upon his estate, to which Lydia Meech excepted on the ground that no such fact was agreed to in the case, and the referee had no right to put in a fact not submitted to him, or infer one not agreed to—and because there is no legal ground to draw such inference.

The court at the April Term, 1864, PIERPOINT, J., presiding, accepted the report and rendered judgment reversing the judgment of the probate court *pro forma*,—to which the appellee excepted.

Levi Underwood, for the appellee maintained that the court below ought to have dismissed the appeal, because it was not served upon the appellee as required by the statute.

The view of the referee upon the merits is wholly unwarranted. The homestead is not dower, or anything analagous to it. The right of dower and the homestead are created by different statutes, for different reasons, and are governed by different rules entirely. One is the right of occupancy for life only; the other an estate in fee by inheritance. The husband must clearly express his intention that the provision made for the widow in his will is in lieu of dower, or the widow is entitled to both the provision made for her in the will and dower. C. S. chap. 54, § 5. It cannot be proved by extraneous evidence. 1 Jar. on Wills, 397, original paging, 886, 3 Am. Ed ; *Fuller* v. *Yates*, 8 Paige, 325; *Pearson* v. *Pearson*, 1 Bro. C. R. 259; *Smith* v. *Kinsburn et al.*, 4 J. C. R. 448; *Foster* v. *Cook*, 3 Bro. C. R. 286; *Doane* v. *Doane*, 33 Vt. 649. It is only by force of the statute that a widow is compelled to make her election. In relation to the homestead, no such provisions are made by the statute; no election is required.

The question is clearly presented—whether a will of the husband bequeathing to his wife a life estate in certain lands, embracing within its limits her homestead right, requires her to release and give up her homestead by force of law if she accepts the will, although no such condition is contained in the will?

The facts in the case are agreed to and in writing, and the referee had no right to find any other fact. The legal effect of the facts agreed to is a question for the court. There was no inference of fact to be drawn from them.

Daniel Roberts, for the appellant, cited to the question of dismissal *Woodward* v. *Spear*, 10 Vt. 420.

The homestead right is devisable by will of the husband, subject to the common right of the widow to dower. The right of the wife to the homestead is not a title, but a mere contingent right—contingent upon her surviving her husband, and liable to be defeated in the particular property, by the husband's acquiring another homestead—a right altogether in abeyance during the husband's life.

Howe v. *Adams*, 28 Vt. 541; *True* v. *Morrill*, *ib.* 672; *Davis & Wife* v. *Andrews*, 30 Vt. 678; *Doane* v. *Doane*, 33 Vt. 650.

If the testator had no power by will to alienate the homestead from his widow unconditionally and without compensation, the peculiar circumstances of this case exclude her from claiming it.

This case is one where the widow is put to her election to take according to the will, or according to the law irrespective of the will.

ALDIS, J. The motion to dismiss was properly overruled. Upon an appeal from the probate court to the county court if the appeal is entered without giving to the appellee the requisite notice, the practice is not to dismiss the appeal, but to continue the case and give the notice.

Under the probate act of 1821 the appeal was taken to the supreme court instead of the county court,—as the supreme court then had appellate jurisdiction in trials of fact both from the county and probate courts; but the provision, that the appellant should give the notice directed by the probate court, was substantially the same then as now. The decision in the case of *Woodward* v. *Spear*, 10 Vt. 420, is therefore an authority on this point. The practice then recognized has been followed ever since.

II. The intent of the homestead act is to create a home for the poor debtor and his family which shall not be liable for his debts, and which upon the death of the husband shall descend to the widow and minor children.

The spirit of the act and all its provisions indicate, that it was intended that the husband should not have the power by will to devise it away from his wife and minor children.

He cannot alienate or mortgage it without the consent of the wife. G. S. c. 68, § 10. If he die leaving a wife and children it shall vest in them free from his debts. It is not to be divided among his other heirs or go to pay his creditors. But the home is preserved for the family.

If the widow have dower, the value of her interest in the homestead is to be deducted from the dower. As the husband by will cannot defeat dower we may well consider that he should not be al-

lowed to defeat the homestead right which so much resembles dower. If a home is to be made for the family why should they be deprived of it at the very time when they may need it most—when the head of the family is taken away? If it is not to be kept for the humane purpose of providing for the widow and minor children, why should it not be appropriated to the purpose of paying honest creditors as well as leave it to the caprice of the husband to dispose of by will? Why should the husband be restrained from deeding or mortgaging it during his life and be permitted to will it away when he dies?

Upon the decease of Judge Meech we have no doubt Mrs. Meech was at liberty to renounce the provisions of the will and elect to have her homestead and her dower.

III. The bequests in the will were given to her expressly in lieu of dower and it is admitted that by taking them she renounces dower. But they are not devised by express words in lieu of homestead. The will says nothing of homestead. And here the main question in the case arises—are the bequests of the will such as legally operate to exclude Mrs. Meech from homestead in case she accept (as she has accepted) the bequests to her. Was it the intention of the testator that she should not have both? If it were, then she must elect which she will have, or rather having accepted the bequests of the will, she must be excluded from homestead.

1. In determining this question we must seek for the intent of the testator in the will and not *dehors* it.

2. The intent to exclude the widow from her legal right must *clearly* appear; if it be doubtful, she is not to be excluded. It is not necessary that this should appear in *express* words. If the terms of the instrument clearly and plainly imply it—if there are provisions in the will which are inconsistent with the intent of allowing her homestead, then the court will find the intent to exclude.

These rules are well settled as the guides by which the court is led to determine when the widow shall be put to elect whether she will have her dower, or the bequests in the will. The same rules should apply in determining whether she shall have her homestead right by statute, or the benefit of the will,—dower and homestead are so much alike,—for the same general objects,—that no distinc-

tion can be made as to the rules applicable to them, when the question of election between them and a will arises.

The general subject as to this doctrine of election is well considered in *Streatfield* v. *Streatfield*, 1 Lead. Cas. in Eq. 283, and in the notes of the English and American editors thereto appended.

In *Dodge* v. *Dodge*, 22 Howard's N. Y. Prac. 63, it is held, that when it clearly appears by the will that the testator, after making provision for the widow, has distributed the rest of his estate among the heirs, and that to allow the widow to take both dower and the bequests of the will would materially lessen the shares given to the heirs—then the intent of the testator not to give her both is held to be plainly manifested, and she shall be required to elect.

There the testator willed to his wife for life the homestead in New Hampshire—the rest of his real estate to his children, an annuity to his wife of $400. and made a charge upon shares of his real estate given to two of his children, it was held she should elect—the charging her annuity upon the real estate devised to two of the heirs indicating such intent—and therein they would be injured.

Examining the provisions of the will we find that the four acres which include the family mansion and grounds are given to Mrs. Meech for life. Then a larger tract comprising the four acres within its boundaries is devised in fee to Ezra Meech, with this clause appended to the description: "Excepting from the lands herein devised to Ezra, the life estate which I have given to my wife, in about four acres thereof, and the house and buildings standing on the four acres."

The house on the four acres was the homestead, from which the widow's homestead must be taken, if she have any. If he intended Ezra to have all but Mrs. Meech's life estate in it, and the language admits of no other construction, he could not have intended that she should have a piece severed to her in fee out of the four acres, of the value of $500. The homestead right is inconsistent with this plain provision of the will.

The setting out of such a little piece in fee from the house and grounds of such a mansion, and obliging his son to have a stranger introduced into a part of the old family mansion and grounds is plainly contradictory to what the testator intended in the division of

his property. He meant his widow to have the mansion and grounds for life; and after her decease that Ezra should have the whole of it.

So he charged Ezra's lands with the payment of $400. of the annuity given Mrs. Meech; and the other devisees with their proper proportions. He could not have intended Ezra's share to be still further reduced by the value of the homestead. See 9 Barr. 456.

IV. It has been claimed that the referee has found the fact that Judge Meech intended that the bequests to her should be in lieu of all other claims which she as his widow could have upon his estate, and that his finding should control. As the court came to the same conclusion, the point is not material to the decision of the case; but we deem it proper to say that when parties present to the court an agreed statement of facts, a referee can only find such facts as are the legal result of the facts agreed upon, or as are naturally and legally deducible from them.

Judgment of the county court affirmed and decree of probate court reversed.

MOSES T. CLOUGH *v.* WILLIAM K. PATRICK.

Promissory Note. Deposition.

The utter worthlessness of a patent right on account of a defect in the principle of its construction, will constitute a full defence to a note given for the purchase price, between the original parties thereto, notwithstanding the patent may have been legal.

The words "in the course of business" appearing in the depositions in this case, held to be but an expression by the witness of his judgment of the legal result of facts which he had specifically stated, and were properly erased by the court.

The defendant's counsel objected to the depositions that they were guarded and avoided details, which indicated a contrived plan to get the notes into the hands of a third party for collection. In regard to this the court told the jury that if they found the depositions subject to this objection, it was a matter that they might take into consideration in weighing the testimony of these witnesses—that the whole question as to the truth of the depositions was for the jury. *Held*, that the court was authorized in so instructing the jury.

Clough *v.* Patrick.

ASSUMPSIT, brought to recover the payment of a note given by the defendant to one S. S. Stone for one hundred dollars, dated 2d February, 1859, payable to said Stone or bearer, in twelve months from date, at the Farmers & Mechanics' Bank in Burlington. Plea, the general issue, and trial by jury, April Term, 1864, PIERPOINT, J., presiding.

The plaintiff's evidence, being the depositions hereinafter mentioned, tended to show that the note was sold by Stone to one Marcus Ball, and by Ball to the plaintiff; that both transfers of said note were made for a valuable consideration, before the maturity of the note, and without any knowledge on the part of either of the parties to such transfers, of any failure of consideration in the note, or of any claim on the part of the maker of the note of a want of consideration, or of any intention on the part of the maker to resist its payment.

The plaintiff introduced the depositions of Stone, Ball and the plaintiff, which, with the note, constituted all the evidence on the part of the plaintiff relating to the sale of the note, in each of which depositions the several deponents used the words "*in the course of business*," referring to the transfers of the note, which words were erased by direction of the court, before the depositions were read to the jury.

The deposition of Clough stated "that the said note was transferred to him by Marcus Ball, of the city of Troy, before the maturity thereof, and before due; that he received the same in the course of business without any knowledge or notice of any claim or defence whatever against the same, and that the said note is still due and unpaid, and that deponent never heard of any defence or pretended defence until a long time after he had become the owner of said note."

Those of Stone and Ball were in the same general terms, without giving facts or circumstances.

It appeared from the evidence introduced by the defendant, that the sole consideration for which said note was given, was the conveyance by Stone to the defendant, by deed, of the right to manufacture in the county of Chittenden, Rogers' patent mowing machine, for which Stone claimed to have a patent; that neither the machines

nor the patterns were present at the time of the sale. The defendant's evidence tended to show that the defendant purchased the right relying entirely on the representations of Stone in regard to its character and value; that Stone represented that the invention had been thoroughly tested in the western part of New York for three years; that it was completely successful, and was rapidly superseding all other mowers; that it was the best mower in use, and possessed great advantages over others for manufacture and use, which he detailed. The defendant's evidence further tended to show that said representations were entirely false; that said patented invention was utterly worthless and could not be made to work as a mowing machine at all; that the defect was in the principle of its construction, and that no machine could be constructed on that principle or in the manner contemplated in the patent, that could be made to mow, or to last but a very short time in the attempt to mow, without breaking, and that all attempts to manufacture machines under said patent had been abandoned. No evidence was given on either side as to the validity of the patent.

The plaintiff requested the court to charge the jury that unless they found the patent right invalid, the worthlessness of the machine patented would work no failure of consideration in this note; and also to charge the jury that it was incumbent on the defendant to prove the transfer of the note illegal, and that the plaintiff was not an innocent holder thereof, which the court refused to do.

The court charged the jury, among other things, that if the jury found from the evidence in the case that the patent right was of no value, from the worthlessness of the machine patented, in the respect which the defendant's evidence tended to show, that would constitute a perfect defence to the note as in favor of Stone, notwithstanding the patent may have been a legal one.

That unless the jury found that Ball purchased the note before maturity in good faith, and paid a valuable consideration therefor, without notice or knowledge of the defence aforesaid on the part of the maker, so that he could recover thereon in his own name—then to entitle the plaintiff to recover in this case, the jury must find that the plaintiff himself purchased the note of Ball in good faith, without notice of any such defence on the part of the maker.

That if the depositions referred to were true they entitle the plaintiff to recover,—but it was claimed by the defendant's counsel that the depositions were guarded—that the deponents swore to only enough to make out their case, and avoided all details, which indicated a contrived plan to get the notes into the hands of a third party for the purposes of collection. In regard to this the court told the jury that if they found the depositions subject to this objection made to them in this respect, it was a matter that they might take into consideration in weighing the testimony of these witnesses; that the whole question as to the truth of the depositions was for the jury.

To the said ruling of the court as to the exclusion and admission of testimony, and the refusal to charge as requested, and the charge as given, the plaintiff excepted.

Daniel Roberts, for the plaintiff.

I. This was a case of a patent right, the validity of which was not questioned, which was duly assigned to the defendant. This was the consideration for the note, viz: the investiture of the defendant with this title to the patent.

There was no want *of consideration*, for the purchaser got all he bargained for, viz: a title; nor a *failure of consideration*, for nothing new has occurred to defeat the title purchased, or to affect the character of the original consideration. See *Barnum* v. *Barnum*, 8 Ct. 469; *Earl of March* v. *Pigott*, 5 Burr. 2802.

If the consideration be the sale of a patent right, and the patent be avoided, this may be a defence, for the title fails. *Parrot* v. *Farnsworth*, Brayt. 174; *Kernoble* v. *Hunt*, 4 Backf. Ind. 57. But see *Taylor* v. *Hare*, 1 New. 260.

But that it is merely worthless is no defence: *Williams* v. *Hicks*, 2 Vt. 36; *Kernoble* v. *Hunt*, *supra*; *Bond* v. *Clark*, 35 Vt. 577; *Sawyer* v. *Vaughan*, 25 Maine, 337.

II. The court erred in striking out from the several depositions the words, "*in the course of business.*"

III. The reference to the character of the depositions was not warranted, and was calculated to prejudice the jury against their truth. *Quesenbury* v. *Quesenbury*, 14 B. Mon. 481; 17 U. S. Dig. 363, pl. 63; *State* v. *McDonnell*, 32 Vt. 534; *Benham* v. *Cary*, 11 Wend. 83.

If this court can see that the verdict was clearly against evidence, so that it was subject to be set aside, upon motion for that cause, it must be regarded as error in the court that his instructions induced such a verdict: *Hoyt* v. *Stevens*, 28 Conn. 538; 3 Graham & Waterman, New Trials, 767; *Newton* v. *Pope*, 1 Cowen, 109; *Lomer* v. *Meeker*, 25 N. Y. 361; *Dolson* v. *Arnold*, 10 How. Pr. 528.

An opinion upon the facts which is not warranted by the evidence is a misdirection of the judge: *Davidson* v. *Stanley*, 3 Scott, 49.

E. J. Phelps, for the defendant.

I. The defendant's evidence showed an entire failure of consideration, and the charge of the court on that point was correct. The rule on this subject is the same in the case of a patent right, as in that of any other property: *Cragin* v. *Fowler*, 34 Vt. 326.

II. The charge as to the right of the plaintiff to recover as a *bona fide* indorsee, was more favorable to the plaintiff than is warranted by law. The defendant having impeached the note as against the original holder, the burden was on the plaintiff to show that he held it under such circumstances as to entitle him to recover, though the payee could not: *Sanford* v. *Norton*, 14 Vt. 233; *Roth & Co.* v. *Colvin, Allen & Co.*, 32 Vt. 126.

III. The observations of the court on the evidence were eminently proper, and were called for by the case.

But whether so or not, they were within the discretion of the judge, and are not open to exception, where no error of law intervenes.

IV. The words "*in the course of business*" were properly erased from the depositions.

1. If they are understood as having no technical meaning, but simply as a statement that the transfer of the note occurred in the course of human events, or in the progress of *some* business, they are of no importance whatever.

2. But if intended to mean that "*due course of business*," understood in legal parlance as expressing the peculiar circumstances which give the indorsee a right of recovery not possessed by his indorser, then the witness was swearing to a conclusion of law, without stating the facts on which it was based.

Clough v. Patrick.

BARRETT, J. The note in suit was given upon and for the purchase "of the right to manufacture in the county of Chittenden, Rogers' patent mowing machine," for which the payee claimed to have a patent.

The defendant's evidence tended to show that said patented invention was utterly worthless, and could not be made to work as a mowing machine at all; that the defect was in the principle of its construction, &c.

Stone sold the right and took the note, payable to himself or bearer twelve months from date. Clough sues it, claiming to hold it by legitimate transfer from Stone to Ball, and from Ball to himself, while current, and for sufficient consideration, and without notice of defect or defence on the score of consideration. The defence is total want of consideration.

The court charged the jury, that, if "the patent right was of no value from the worthlessness of the machine patented, in the respect which the defendant's evidence tended to show, that would constitute a perfect defence as to Stone, notwithstanding the patent may have been a legal one.

We think this was correct, upon common and well settled principles, and in conformity with the doctrine assumed and enunciated in *Cragin* v. *Fowler et al.*, 34 Vt.

The *patented right* was the consideration for the note. The defendant's evidence tended to show that that was utterly worthless,—because the invention could not be made to work as a mowing machine at all; that the defect was in the principle of construction, &c. The very thing purchased was utterly worthless.

The expression, "notwithstanding the patent may have been a legal one," we understand to mean no more than that the letters patent were authentic and not vacated. For we understand that, though such worthlessness of the patented invention as the evidence tended to show, would be a ground for holding the patent invalid, still it does not necessarily imply that any intrinsic defect inheres to the letters patent themselves—and until vacated, their invalidity for this cause can be asserted only by persons against whom they are sought to be enforced, and for cause shown *aliunde* the letters themselves.

This was not the case of the purchase of a chance or hazard, like some of the cases cited in the argument, but the purchase of an existing right. If that was utterly worthless, then, of course, it could not constitute a valuable consideration. So far as the question of consideration is concerned, it would be immaterial whether the defence of failure was put upon the ground that no right existed under the letters patent, on account of the worthlessness of the invention, or that the right itself was utterly worthless.

The cases cited—*Williams* v. *Hicks*, 2 Vt. 36; *Kennoble* v. *Hunt*, 4 Blackf. 57; *Taylor* v. *Hall*, 1 New. 260;—we do not regard as in conflict with what we here hold.

In the first of said cases, the question decided was, as to the propriety of the charge upon that part of the defendant's evidence that tended to show "that the patent was useless, and of no value and a vile cheat," the court telling the jury that, if they found the patent to be of no value, or that the discovery was no improvement, or a much less improvement than was represented when the contract was made, then the jury were to inquire whether the defendant was defrauded into the making of the contract, and if so, they should deduct so much from what was due on the note, as the defendant had been injured by said fraud.

It involved, not the question whether total failure of consideration would constitute a defence to the note,—nor whether the utter worthlessness of the patent right would constitute such total failure, but merely whether a fraud, involving a partial failure of consideration, could be a defence under the general issue.

If the county court had confined their instructions to the point, that the patent was of no value, and the supreme court had held the instructions erroneous, for the reason that that would constitute no defence to the note, that case and decision would have borne upon this. But, when the county court proceeded to tell the jury that, if the improvement was *much less* than was represented, they would make a proportionate deduction from the amount of the note, a decision that such charge was erroneous does not involve, or imply that total want of value in the patent right would not constitute a defence on the ground of a total failure of consideration. The remarks of the judge outside of the point in question have not the

force of authority, however explicit and decisive they may be; but in that case, when taken in connection with the question before the court, we do not regard those remarks as indicating any opinion upon the subject of a total want of value, as constituting a defence. The reference of Judge PADDOCK to the case of *Taylor* v. *Hall*, 1 New Rep. 260, has some tendency to show the view in which his remarks were made. That case did not involve any question as to the total failure of consideration. The plaintiff had contracted to pay a stipulated sum annually for the use of a patent right for a given number of years. He proceeded and used it for several years, and paid annually the specified rent. Before the expiration of the full period, it was discovered that the patentee was not the original inventor. He thereupon brought a suit to recover back what he had paid. The letters patent had not been vacated. No claim was made that the invention was not useful, or that its use had not been valuable to the plaintiff, or that there was any fraud involved. The court held that the plaintiff was not entitled to recover back what he had paid for the use that he had enjoyed.

As to the case of *Kernoble* v. *Hunt*, 4 Blackf. 57, it is plain that the judge was mainly occupied with the technical sufficiency of the pleas, and especially of the third plea, as setting forth a warranty made, or a deceit practiced by the plaintiff in his representations as to the patent in question being a good, useful and valuable improvement for grinding corn and other grain. That the court did not regard the *third* plea as presenting the subject of the total failure of consideration as a defence, is apparent from the language of the opinion, viz: "that no defects or insufficiencies, either in title or anything else connected with the consideration, are complained of; there is no charge that anything was concealed from his knowledge in any way. The complaint is that the vendor represented it to be useful and valuable when it was not, and that he, confiding in that representation, purchased. These allegations are insufficient; no material issue can be made upon them; what one man may esteem very valuable another may deem worth nothing."

Without undertaking to criticise the soundness or cogency of the ideas and processes of the learned judge, touching the technical sufficiency of that plea, it seems plain that the idea did not enter his

mind, that the defence presented by said plea was a total failure of consideration.

As to the erasure of the words "in the course of business": Aside from that expression, the depositions do not show any business relation or transaction between Stone and Ball, or between Ball and Clough, except this one of the transfer of the note in suit. Each in his deposition tells what that transaction was. Does the erased expression state any additional or modifying fact entering into or affecting the transaction of transfer? In the opinion of a majority of the court, it does not;—that, in the mercantile law, with reference to the legal character of the transfer of negotiable paper, that expression is a mere formulary for stating a conclusion of law upon certain facts which, in the given case, may be shown to exist,—to the effect that the transfer was made while the paper was current, for a sufficient consideration moving between the parties, and *bona fide*. Often it becomes necessary to know just what was done, and when it was done, and under what circumstances, in order to determine whether the transfer was so made.

In this case the deponents stated specifically certain facts, and all that is shown in the case as constituting what is meant in the law by the expression, "the course of business,"—so that, superadding to the statement of those facts that expression neither adds, nor implies the existence of any other fact. It was expressing by the witness his judgment of the legal result of the facts which he had specifically stated. Wherefore a majority of the court think the expression was properly erased.

The remaining question is as to the propriety of the remarks of the judge to the jury touching the character of the evidence introduced by the plaintiff, and their province in considering it.

We understand the law of this state to be, that, when the legal validity of a negotiable note, as between payee and maker, is impeached, it is incumbent on a subsequent holder to show that he came by it in such a way as to give him the character of a *bona fide* holder for value. The plaintiff occupied that position in this case; and, for the purpose of maintaining his right in this respect, he gave in evidence the three depositions; and they were all the evidence he had except the note itself in his possession.

As a general rule, both the substance and manner of a party's evidence is a fair subject of comment by counsel on either side, both as to its tendency as evidence, and as to the weight to be given to it by the jury; and that, in these respects, it is to be taken and considered in its relation to the other evidence in the case. In this case the defendant had given evidence tending to show a gross imposition and cheat practiced upon him by Stone, by which Stone had procured from him this note. It turned up in the hands of Clough as holder and claimant. It was sued by him, and stood for defence. Clough knew that he must maintain his title and right. He produced these depositions wherewith to do it; and it seems to us that when examined and considered in connection, and in reference to the other evidence in the case, they suggested and justified the criticism which counsel made upon them; and we think it was proper for the court to submit them to the consideration of the jury in the light of that criticism, as bearing upon the credit and weight to be given to the testimony contained in them. It was not giving loose rein to the jury, and permitting them to wander in improper fields, as counsel characterize it, but appropriately directing their attention to a striking feature of the plaintiff's evidence, and submitting it to their consideration as bearing upon the truth and weight of the testimony.

What has already been said, as to the erasure made in the depositions, applies to the complaint of the impropriety of holding them subject to that criticism and consideration, after being thus erased. And we add, that the depositions, with that expression out, seem to us to stand for a more favorable consideration than with it in. We grant that, if that expression rendered the depositions any the less guarded, or supplied any detail of the transaction of the transfer of the note, or presented any fact affecting the plaintiff's right to maintain his suit, it would be improper either to erase it, or, after such erasure, to permit the depositions to be criticised and considered as they were.

The judgment is affirmed.

WILLIAM HENRY AND OTHERS *v.* DANIEL JACKSON AND OTHERS.

[IN CHANCERY.]

Evidence. Union Store Association. Agency.

Evidence of the custom of doing business in a union store association, whose constitution and all rights and duties under it stand wholly upon agreement and consent, and not at all upon law or acts of incorporation, is admissible to show consent to or acquiescence in a practical and actual modification or change of their by-laws.

The directors of such an association should not be held to a strict performance of all the duties prescribed for them in the by-laws, as in case of trustees or directors of a private corporation, when it appears that those duties were mainly transferred by the association to an agent, and the members thereof knew how the business was being managed, and of the deviations from the by-laws, and acquiesced in the same.

The directors could not be held responsible for bad debts occasioned by allowing the agent to sell on credit; nor for depreciation of stock; nor for error in estimates of current expenses; nor for fixing the prices of goods too low to pay current expenses, this subject having been discussed in the meetings of the division, and all members having shared in proportion to their purchases in the advantage of buying cheap.

In assessing the losses upon members, those who left the state before the business of the division was closed, and are now beyond the reach of process, should be left out of the computation.

BILL IN CHANCERY.*

ALDIS, J. The bill seeks to charge the defendants with their shares of the losses sustained in the management of an union store at Westford from June 1st, 1851, to August 20th, 1856.

The defendants insist they ought not to contribute to make up these losses because they have arisen from the negligence of three of the orators—Beach, Henry and Bellows—in the discharge of their duty as directors.

I. The defendants claim that this fact of negligence has been found by the master appointed to take the account. We are clear however that that subject was not referred to him. That is the vital point of defence made in the answers—the leading and material question in issue upon which the court, and not the master, is called upon to decide. The order of reference does not refer it to him

* None of the papers in this case, except the opinion of the court delivered by Judge ALDIS, were sent to the reporter.

for consideration. His finding upon this question, whether founded upon the evidence now before us or upon other proofs not before us we cannot tell, must be laid out of the case.

II. To determine this question of negligence we must ascertain what were the respective rights and duties of the directors of the division and of the agents; then the losses, from what causes they arose and whether from the negligence of the directors so as to make them chargeable.

The defendants claim that the directors should be held to the strict performance of all the duties prescribed for them in the by-laws; and that they are responsible for the same measure of diligence that the trustees and directors of private corporations are.

But in regard to this association it is to be observed that their constitution and all their rights and duties under it stand wholly upon agreement and consent—not at all upon law or acts of incorporation. Hence evidence of their custom—of their established and uniform mode of doing business—becomes admissible to show consent to or acquiescence in a practice and actual modification or change of their by-laws.

If these directors were to be held liable for the performance of the duties and the exercise of the powers named in their written articles, I should find it very difficult to say that they had not grossly neglected them, and had not contributed at least to increase the losses by erroneously reporting the condition of the business to be safe and prosperous, and so prolonging the existence of the association.

But the court does not take this view of their duties, nor consider that the evidence shows such negligence of the real and actual duties imposed upon and expected of them, as should subject them to its losses.

Without attempting any reference in detail to the great volume of evidence and exhibits, we will briefly refer to those more obvious matters appearing in the nature of the organization, its character, object, written articles, real necessities and in the character of the men who composed it and of their uniform mode of doing business, which lead us to conclude that it would not be just to charge the three directors with these losses.

First. Their business was to buy goods and sell them to the members, and sell the products of the members, so as to save to themselves some of the profits which are usually paid to the merchants. But the members appear, all of them, to have been farmers and mechanics wholly ignorant of this kind of trade. The directors were known to be equally ignorant of the business, and reluctant to enter upon the duties of their office.

Their constitution is quite full and minute in establishing rules fit for a debating society, but wholly silent upon points the most vital to their pecuniary welfare. They propose to establish a country store to sell goods much cheaper than other stores, yet nothing is said as to how a sufficient capital—the first element of success—is to be provided. ' The $10. admission fee, of which $7. might at any time be withdrawn, is too insignificant a contribution to this end to be regarded. This important matter is left open for practical adjustment by the division, to be solved by borrowing money or buying on a credit as best they might. How far want of capital, the necessity of borrowing, perhaps of usurers; or buying upon credit poor goods at high prices may have contributed to loss it is impossible to tell. The theory of trade upon which the association was founded seems to have excluded, practically, at least to a great extent, a consideration of this point.

It must have been obvious at the outset that they must have an agent or clerk to tend the store and sell the goods, to judge as to whom to trust and to collect debts—to see to the replenishing of the stock and buying goods in market. It could not be expected that directors would do more than advise and oversee in these matters. Yet this vital point is only incidentally alluded to in one of the articles. He who is practically the most important officer of the company—the real manager of the whole business—is not referred to as an officer of the division. Although his duties comprise almost the whole work to be done, nothing is said as to how he shall be employed, or what he shall do, or what record or report he shall make of his doings. This palpable omission in the constitution began to show itself and to call for relief at the beginning of the business. When directors were chosen, upon whom the written articles imposed these duties in part, they hesitated to accept, said they were unskilful

and inexperienced; and then at the first meeting it was talked up (as the witnesses say) that an agent must be hired to attend to the business, and that there would not be much for the directors to do. This agent should buy and sell goods and make the inventories. From that first meeting agents were hired, and did in fact manage the whole business unless it was to borrow money—made the directors' reports and read them to the meeting. We cannot think but that every member of the association knew full well how all the business was done, and that the written regulations as to the duties of the directors were not expected to be lived up to. Witnesses may be asked whether to their knowledge the members knew that the directors did not perform the duties named in the articles, and may be obliged to say in truth that they cannot say that the members did know of it. But when we consider that these duties if performed would constantly have brought the knowledge that they were so performed to the members, and that from the beginning they were not performed at all for a period of over five years—that the division held monthly meetings at which it was expressly provided that they might require reports from the directors, and none ever were required —it is impossible for the mind to feel that the members did not know that the directors were not expected to come up to the standard of the constitution;—that in fact all acquiesced in having the business done as it was practically done.

By the by-laws and by the practice of the association the members had the right to examine the books and papers of the officers, and in this respect we think had much more extensive rights than have the members of ordinary corporations. So too it is obvious that the division was expected to exercise a much more direct control and constant supervision of business matters, than do the members or stockholders of common joint stock companies. The division was to hold monthly meetings, and business of great importance was not to be disposed of till considered at two regular meetings. The by-laws provide with much minuteness how these meetings shall be held and managed, and that a secretary shall record their doings. Frequent meetings appear to have been held; but the record of their doings is either not kept at all, or so imperfectly that nothing can be gathered from them of any value in the de-

termination of the case, except what refers to the purchase of the store.

In this absence of records the testimony of witnesses shows that the division in the monthly meetings of its members directed as to the raising of money, the hiring of agents to buy and sell goods, to transact the business of the concern and to make inventories,—and to fix the prices at which goods should be sold to the members and to others.

The directors were by the by-laws to inspect the books once a month—to take an account of stock once in three months and report to the division quarterly, or oftener if the division required. They never in fact did these duties oftener than once a year, yet the division never required them to either examine or report oftener; nor does it appear that any member ever objected to this omission, or moved that the directors comply with the written articles. When they did make their reports they relied mainly upon the agents, and the agents made up the reports and read them to the meetings as directors' reports.

The reports which were made were obviously most meagre, indefinite and blundering; they could not have been satisfactory to any persons at all skilled in mercantile business. They contain manifest errors and blunders, such as plainly spring from incompetency—not from dishonesty; and yet they never seem to have attracted attention or awakened suspicion.

Whether we look at the conduct of the division, of its officers and of the agent, or at the practical operation of the association, we see from first to last an entire disregard of the by-laws in all those important matters that directly affected the pecuniary condition of the company and which were intended theoretically as the safeguards of its prosperity; and the substitution in their place of the employment of an agent and blind and implicit reliance in his management and reports. For this change in the practical working of the business we do not think the directors were chiefly or mainly to blame. It was partly the fault of the division, and mainly the inevitable and natural result of the system. It was the attempt of men to carry on a business of which they were wholly ignorant; it proceeded as all such attempts must, by relying upon others, who, they supposed, un-

derstood the business and would carry it on faithfully, but who had not the stimulus of a personal interest in the enterprise, and it ended as such enterprises usually do in bankruptcy.

To throw the burden of such losses upon the directors alone would seem to us a plain injustice.

We have thus briefly indicated the impression which the evidence in the case has produced upon our minds, as to what was the actual operation of the business, and what as we esteem it was the practical abandonment by the division of the articles of their association which pertain to the management of their affairs. We have examined the testimony and the exhibits as carefully as our time would allow and without going into a detailed commentary on the evidence, thus briefly state our result.

We deem it our duty however to make some reference to the losses and their connection with the alleged negligence of the directors.

The business was carried on about five years and three months. The losses during that time (aside from the purchase of the store) were $2,512.33.

The bad debts were about $450. This was a loss not occasioned by the directors, but by the employment of an agent and allowing him to sell goods on credit. It does not appear that any one was negligent herein; it was a loss to be expected if goods were sold on trust.

A large loss must have arisen from the depreciation of stock. The goods on hand when the business was closed were sold at ten per cent. discount from their cost. So in making up the annual inventories it would seem that no allowance was made for the depreciation in value of goods on hand, obviously a source of error. There is nothing from which we are able to satisfy ourselves as to what the loss from this source was.

It is said in the master's report that the losses occurred in the ordinary way from the current expenses exceeding the income; and it is urged by the defendants that this was a steady drain from the beginning upon the resources of the company, and one which could have been easily discovered; and then could have been remedied by raising the prices at which the goods were sold. We think that in

fact the excess of current expenses over the profits from the sales was one cause of loss. The expenses of the concern were in the main interest on borrowed capital, salary of agent, rent of store and incidental expenses which it would seem might easily have been ascertained. The profits on sales should have been estimated high enough to cover all these safely. But when we consider how conjectural such estimates must have been in the outset—how few data the directors had upon which to base estimates—how unskilled they were in the business—and we may add how desirous all the members must have been "to secure the commodities of life upon the best possible terms," the causes of error are apparent in spite of the best efforts to judge aright and the exercise of their best care. Nor are we satisfied that the losses all arose from expenses exceeding profits. The tables of losses and gains in the master's report do not seem to be quite consistent with this theory. Thus in 1851 from May to December there was a loss of $132. From December, 1851, to December, 1852, there was a gain of $200. The next year a loss of $419., and then in three months and twelve days a loss of $690., then in nine months more only a loss of $164. These fluctuations seem too great and sudden to be accounted for by the mere operation of the excess of ordinary expenses over ordinary profits. We think there must be losses not yet explained.

Again the conditions upon which goods should be sold to members and to others was the theme of discussion in the meetings of the division. That the terms on which members bought and how much they were preferred were known to all the members seems indisputable. If the goods were sold too low, at prices not sufficiently remunerative to the division, all the members shared in this advantage of buying cheap in proportion to their purchases, though their gain in this respect proved ultimately a loss to the division. It does not seem just to us that losses arising to the division in this manner should be cast upon the directors.

In thus reviewing the causes of the losses we are unable to find a single instance in which the losses can be directly traced to the negligence of the directors.

If they are to be made liable at all it must be upon the ground that they ought to have examined the condition of their affairs—

have found out that they were losing—reported to the division, and thus enabled the members to close the business, or to increase the prices at which goods were sold; but as to this claim of the defendants we have already indicated our opinion.

As to Jackson and Allen, we are satisfied that they both were members of the division,—that Jackson signed the articles and that Allen paid his admission fee and acted as a member.

It appears that three of the members, Goodhue, Hill and Osgood reside out of the state—at the west (Illinois,) and removed from the state before the business of the division was closed, or the orators could have called on them for contribution. Regarding them as thus wholly beyond the reach of process, and that the orators have no practicable means of enforcing contribution to which they can be reasonably required to resort, we think for the purposes of a decree in this case they must be left out of the computation.

Much testimony was taken as to the purchase of the store and the consequent loss.

That the directors in making this purchase were directed by the vote of the division seems to us satisfactorily proved—that the requisite number of meetings were held and the requisite number of members attended. The purchase at the time seems to have been a good one;—the property was then worth, and for more than two years thereafter and up to the time the division stopped business, all that was paid for it. Nor are we satisfied that any objection was made by any one but those who about that time withdrew and are not made chargeable with loss on account of the purchase. For their shares in this loss the defendants Allen, Jackson and Rice should contribute as stated in the master's report. We think too the loss ought to be borne by those who were members at the time of dissolution and should not include the Chases, Partridge and Castle who left before that time—all but Castle in 1854; for there was no loss on the property up to that time.

As to interest. If interest has been twice cast and included in the price of the store, as claimed in the brief of the counsel for the defendants, it is clearly an error. But as we understand the master's report the price of the store was not included in the loss of

$2512.33 reported by the master, but is kept wholly separate from that sum.

If the directors paid $1650. for the store, or became liable so to do on the 15th of April, 1854, that sum should be on interest from that date because the directors have had to pay interest from that date. While the store was used by the division no rents would be received. After that whenever rents were received they should have been applied when received by the directors to pay for the store. So of the $1006.75. received on the sale of the store. The sums paid for insurance, &c., on the store should be added to the cost of the store, with interest from the time they were paid. If the master has not in his computations proceeded substantially on these principles, the report in this respect should be corrected. He does not say whether interest is computed by him on the rents of the store received by the directors from the times they were received to December 1st, 1863, in making up the sum of $842.50. (which would be the same thing as applying them when received)—or is not. We cannot say there is error in that respect—but it can be readily ascertained and if erroneous corrected by the chancellor.

The question of costs we think best to remand to the chancellor according to the stipulation of the parties.

Decree affirmed and case remanded, the question of costs to be determined by the chancellor, and computation of interest to be reviewed, and if erroneous, to be corrected according to the rules prescribed by this court.

BROWN, WOOD & WASHBURN *v.* P. E. HAVEN.

Contract. Guaranty. Damages. Pleading.

The plaintiffs purchased of one Reynolds a canal boat, and took a bill of sale thereof, on which was executed by Reynolds, as part of the same transaction, a stipulation as follows: "I further agree that there is no incumbrance on said boat except what is held by P. E. Haven, and about $25. to William Cain on her sails, and I agree to pay said Cain and clear said sails from said Cain's incumbrance as soon as practicable." At the same time, and as one of the inducements to the

plaintiffs to make the purchase, Reynolds procured the defendant to execute on the back of said instrument the following guaranty: "I guarantee that said Reynolds shall clear said canal boat from said William Cain's claim on said sails as he has within agreed." Cain's claim amounted to about $70. instead of $25. at the date of defendant's guaranty, and existed under a bill of sale given by Reynolds to Cain to secure the price of the sails prior to the plaintiffs' purchase, and embraced the boat as well as the sails. All parties supposed at the time of the contract that Cain's claim was but $25. *Held*, that this agreement of Reynolds was an agreement not merely to pay a twenty-five dollar claim, but to pay Cain's claim, whatever it might be; that the words "about $25." are words of description merely, not words of limitation. *Held*, also, that upon breach of this agreement the defendant became liable on his guaranty to the full extent of Cain's incumbrance.

Cain replevied the boat in the hands of one of the plaintiffs after their said purchase, and recovered judgment for the amount of his claim on the sails, and the defendant and Reynolds had notice of the suit and the former conducted the defence. *Held*, that the defendant is bound by the result; and having advised the plaintiffs that it was their duty to defend the suit, he is liable for the costs and expenses thereof, the amount of Cain's lien on the sails being less than the value of the sails.

One of the plaintiffs, previous to the bringing of this suit, had sold his interest in the boat, including his interest in the contract of purchase, to one of the other plaintiffs, and the other plaintiffs had made the whole payment of Cain's judgment. *Held*, that this did not make him, who had sold, an improper party to this suit.

ASSUMPSIT upon a guaranty in a special count and in the general counts. The case was tried by the court upon an agreed statement of facts.

The court, at the September Term, 1864, PIERPOINT, J., presiding, rendered judgment *pro forma* for the defendant to recover his costs,—to which judgment the plaintiffs excepted.

The facts agreed upon were as follows: On the 15th day of February, 1860, one S. A. Reynolds, being the owner (with the exceptions hereinafter mentioned) of the canal boat "Trojan," her sails, rigging, masts, spars, booms, cabin furniture and all other appendages, then lying at harbor in Burlington, Vermont, sold the same, at Essex, in the state of New York, to the plaintiffs for the sum of $500., the sails on said boat being worth $100. or thereabouts, which sum of $500. was paid by the plaintiffs to Reynolds. Reynolds on that occasion executed and delivered to the plaintiffs a bill of sale of said property.

At the time of the sale Reynolds was inquired of as to whether there was any incumbrance on said boat, and he represented that

there was none except a claim of about $25. in favor of one William Cain, of Whitehall, on the sails of said boat. Both the plaintiffs and the defendant in this suit believed such to be the fact, and neither of the parties had any notice, actual or constructive, of any other incumbrance on the boat, her tackle, &c.

At the same time, and as a part of the same transaction, Reynolds executed and delivered to the plaintiffs a paper (on the same sheet with the bill of sale) in the words following, to wit:

"I further agree that there is no incumbrance on said boat except what is held by P. E. Haven, and about $25. to Wm. Cain on her sails, and I agree to pay said Cain and clear said sails from said Cain's incumbrance as soon as practicable.

S. A. REYNOLDS."

The incumbrance to P. E. Haven was paid off at the time of said sale. At the time and before the consummation of the sale by Reynolds to the plaintiffs, the plaintiffs exacted security of Reynolds against any claim on the boat, her sails, tackle, &c., who procured the defendant to execute as his surety a paper to the plaintiffs of the following tenor, on the back of the other papers signed by Reynolds:

"I guarantee that said Reynolds shall clear said canal boat from said William Cain's claim on said sails, as he has within agreed.

P. E. HAVEN."

Which paper was delivered to the plaintiffs.

Haven would not have signed said paper had he supposed or believed that there was any other claim upon the boat than the claim of Cain of $25. on the sails. Nor would the plaintiffs have consummated the trade but for the guarantee of the defendant, they relying thereon as security against any incumbrance on the boat, her sails, tackle, &c.

The plaintiffs thereupon took possession of the boat, her tackle, &c., and continued in the exclusive possession of the same until the 1st day of April, 1860, when H. L. Wood, one of the plaintiffs, sold to Brown, another of the plaintiffs, all his interest in the partnership property and effects of Brown and Wood, and all his interest in said boat, tackle, &c., and since that time has had no interest in the same, and has none now. And from thence said Brown and Wash-

burn had the exclusive possession of the same until the 20th day of June, A. D. 1861, when Washburn, having the boat in his custody at Whitehall, in the state of New York, William Cain brought this action of replevin against Washburn for said boat, her tackle, &c., and took the same, which was re-delivered to Washburn upon his giving security to return the same or pay the judgment which might be rendered in said suit.

Cain's suit was based upon the bill of sale from Reynolds to him, which was given as security for the payment by Reynolds to Cain of the price of the sails on said boat; and there was due Cain under said bill of sale when said suit was commenced, the sum of $78.08. Said suit was prosecuted to final judgment.

By the laws of the state of New York chattel mortgages not recorded in the town clerk's office are void as against subsequent *bona fide* purchasers of the property, and the above named mortgage was not so recorded.

It was further agreed that Brown and Washburn paid, before the commencement of this suit, said judgment, amounting to the sum of $78.08, damages, and $75.85, costs of that suit—which sums they were compelled to pay, in order to retain possession of said boat, &c. Brown and Washburn also paid for costs in and about said suit the sum of $88.93.

It was also agreed that immediately after the seizure of the boat at Whitehall by Cain, said Washburn informed Haven of the commencement of the suit, and Haven advised him that it was his duty to defend it, and the suit was fully defended, and Haven acted as counsel therein.

It was further agreed that Reynolds never paid Cain any claim for sails which he had at the time of the sale from Reynolds to the plaintiffs; that Reynolds was duly notified of the pendency of said suit, and requested by Brown and Washburn to fix the matter up; this he neglected to do, and paid no attention to the matter. Reynolds then was and since has been insolvent. The plaintiffs have never received any portion of the amounts which they have so paid in the premises from any person.

J. French and *H. W. Dana*, for the plaintiffs, maintained that the claim of Cain upon the boat was covered by the defendant's guar-

anty. Fell on Guaranty, 140; Theobold on Principal and Surety, 45, 46; *Noyes & Co.* v. *Nichols*, 28 Vt. 159; *Mason* v. *Pritchard*, 12 East, 227; *Mayer* v. *Isaacs*, 6 M. & W. 605; *Hargrave* v. *Smee*, 6 Bing. 244; *Drummond* v. *Prestman*, 12 Wheat. 516.

The plaintiffs are entitled to recover the amount of the judgment in the case of Cain against Washburn.

That judgment was founded on the claim against which the defendant's guaranty was given, and the action was fully defended, and that in good faith. *Carpenter* v. *Pier*, 30 Vt. 81; *Knapp* v. *Marlboro*, 34 Vt. 235; *Pitkin* v. *Leavitt*, 13 Vt. 379; *Clark* v. *Carrington*, 7 Cranch. 708; *French* v. *Parish*, 14 N. H. 496; *Kip* v. *Brigham*, 6 Johns. 158; *Duffield* v. *Scott*, 3 Term, 374; *Bander* v. *Fremberger*, 4 Dallas, 436; *Hamilton* v. *Cutts*, 4 Mass. 349; *Brown* v. *Taylor*, 13 Vt. 631; *Warner* v. *McGary*, 4 Vt. 507; *Walker* v. *Ferrin*, 4 Vt. 523; *Boorman* v. *Johnson*, 12 Wend. 446; *Barney* v. *Dewey*, 13 Johns. 224; *Tarleton* v. *Tarleton*, 4 M. & S. 20; *Burs* v. *Pinney*, 12 Wend. 309; Phillips on Ev., C. & H. Notes, 2, 44, 174.

As to the recovery of these plaintiffs' costs and expenses in the suit Cain against Washburn:

Where a party holding an indemnity against a claim is obliged by legal proceedings to pay the demand in the first instance, it is well settled that he can recover against the indemnitor not only the amount which he is obliged to pay, but also his costs and expenditures incurred in defending the action. Sedgwick on damages, 325, *et seq.*; *Baker* v. *Martin*, 3 Barb. 634; *Mott* v. *Hicks*, 1 Cowen, 513; *Downer* v. *Baxter*, 30 Vt. 467; *Duffield* v. *Scott*, 3 Term, 374; *Smith* v. *Compton*, 3 B. & Ad. 407. And especially where, as in this case, the indemnitor is notified of the pendency of the suit. Sedgwick on Damages, 327; *Ex parte* Marshall, 1 Atk. 262; *Kip* v. *Brigham*, 7 Johns. 168; *N. York State M. Ins. Co.* v. *Prot, Ins. Co.*, 1 Story, 458.

Levi Underwood, for the defendant.

PECK, J. 1. One question made in this case is, whether the claim in favor of Cain upon the property purchased by the plaintiffs of Reynolds, and which the plaintiffs were afterwards compelled to pay, comes within the scope of the defendant Haven's guaranty. This involves a question of construction of the guaranty, as bearing

upon the question whether the claim which the plaintiffs were compelled to pay, and for which they claim to recover, is the one referred to in the defendant's guaranty. When the plaintiffs purchased of Reynolds the canal boat Trojan, together with the sails, rigging, &c., and other appendages, *with* and *on* the boat, and took the bill of sale thereof from Reynolds, Reynolds, as part of the same transaction, executed to the plaintiffs, on the same piece of paper with the bill of sale, the following stipulation: "I further agree that there is no incumbrance on said boat except what is held by P. E. Haven, and about $25. to Wm. Cain on her sails, and I agree to pay said Cain and clear said sails from said Cain's incumbrance as soon as practicable." At the same time, and as one of the inducements to the plaintiffs to make the purchase, Reynolds procured the defendant to execute on the back of said instrument the following guaranty: "*I guarantee that said Reynolds shall clear said canal boat from said William Cain's claim on said sails, as he has within agreed.*"

It is conceded in the agreed statement of facts upon which the case was tried, that in 1861, when Cain replevied the boat and its appendages, including her sails, to enforce his claim, it amounted to $78. which must have included some interest; so that, as is assumed in argument, it must have been about $70. at the date of the defendant's guaranty. This claim existed under a bill of sale given by Reynolds to Cain, to secure the price of the sails, prior to the plaintiffs' purchase. That bill of sale or mortgage embraced the boat as well as the sails. It is insisted by the defendant's counsel that this claim which the plaintiffs were compelled to pay to Cain, being $70. instead of $25., and being upon the boat as well as upon her sails, instead of being on her sails only, is not the claim referred to in the defendant's guaranty, and not embraced in it. In determining this question, so far as it depends on the construction of the defendant's guaranty, it is necessary to refer to the agreement of Reynolds, since the defendant in his guaranty on the back of Reynolds' agreement, refers expressly to what Reynolds "*has within agreed.*" It is obvious, however that the defendant's engagement was not intended, and cannot be construed, to be co-extensive with that of Reynolds. That stipulation in Reynolds' agreement by which he agrees that there is no incumbrance upon the property except the two claims mentioned

in his contract, is clearly not within the defendant's guaranty. But Reynolds agrees further—he says in his contract, "*and I agree to pay said Cain and clear said sails from said incumbrance as soon as practicable.*" The defendant at the same time on the back of the same instrument says, "I guarantee that said Reynolds shall clear said canal boat from said William Cain's claim on said sails *as he has within agreed.*" What had Reynolds agreed in relation to clearing said canal boat from Cain's claim on said sails? Whatever Reynolds had agreed in relation to it, the defendant guaranteed, and no more. The agreement of Reynolds to pay and clear off Cain's incumbrance as soon as practicable, is an agreement not merely to pay a twenty-five dollar claim, but to pay that claim, whatever it might be, notwithstanding in a previous part of his contract he has stipulated that there is no incumbrance except to Haven and about $25. to Wm. Cain. In construing the stipulation to pay and clear off the incumbrance to Cain, the previous words, "about $25." are to be regarded as words of description merely to identify the claim, and not words of limitation of the amount Reynolds is to pay on it. His agreement is to pay and clear off that claim. The fact that it turns out to be $70. instead of $25. does not destroy its identity; nor does the fact that it turns out to be secured not only upon the sails but upon the boat also. It is no less a claim upon the sails because it is upon the boat also. It is an incumbrance due to Cain, and there can be no doubt of its being the same debt Reynolds agreed to pay and clear off, although the description of it is in one particular inaccurate, and in another incomplete. Reynolds, therefore, was guilty of a breach of his stipulation to pay and clear off this claim in a reasonable time. The defendant having guaranteed this stipulation of Reynolds, is liable for the breach of it. The question is, whether the claim the plaintiffs were compelled to pay is the same claim in fact that is referred to in the defendant's guaranty. It is a question of identity. In the absence of fraud on the part of the plaintiffs, the fact that Cain's claim was $70. instead of $25. cannot absolve the defendant from his guaranty, nor limit his liability to $25. There was no fraud on the part of the plaintiffs, as it is stated in the case that all parties supposed at the time of the contract that Cain's claim was but $25. The statement in the case

that the defendant would not have signed the guaranty had he known that Cain's claim exceeded $25. cannot vary the case; especially as it is also stated that the plaintiffs would not have made the purchase but for the defendant's guaranty, they relying on it as security.

2. It is insisted that as the plaintiffs rely on the judgment in the action of replevin to establish the existence and amount of Cain's lien, and as it appears that Cain's bill of sale, not having been recorded, was inoperative by the laws of New York as against *bona fide* purchasers, there could have been no recovery in favor of Cain without showing that the plaintiffs had notice, when they purchased, of Cain's lien and its amount. It is argued from this that the judgment in favor of Cain against Washburn, one of the plaintiffs, is conclusive evidence that the plaintiffs purchased with notice, not only of the existence, but of the amount of Cain's lien, and that they were guilty of a fraud in omitting to inform the defendant of the true amount of Cain's incumbrance. But notice to the plaintiffs when they purchased, that Cain had a lien on the sails, although they were informed by Reynolds that its amount was only $25., was sufficient to warrant a recovery by Cain for the full amount of his claim. The notice was sufficient to put the plaintiffs and the defendant on inquiry. But if this is not so, and the judgment in favor of Cain is erroneous in this respect, it is binding on the defendant, as he and Reynolds had notice of the suit, and the defendant advised to defend it, and, as counsel, conducted the defence. Even if it was necessary in order to warrant a recovery by Cain to the full amount of his claim, to show that the plaintiffs purchased with notice of its true amount, we cannot treat the judgment as conclusive evidence that the plaintiffs purchased with such notice, when it is expressly admitted in the agreed statement of facts, that when the plaintiffs purchased, all parties supposed Cain's claim was only $25. This express admission is a waiver of such estoppel, even if it might otherwise have availed the defendant, which is by no means conceded, and which is not necessary to decide.

3. It is also insisted that the judgment in favor of Cain is not conclusive against the defendant. But as the defendant and Reynolds had seasonable notice of the suit, and an opportunity to defend it, and as the defendant conducted the defence, he is bound by the

result; and as the defendant advised the plaintiffs that it was their duty to defend the suit, he is liable for the costs and expenses of the suit, as the amount of Cain's lien on the sails did not exceed the value of the sales. The plaintiffs could not, at the commencement of the suit, have lessened their damages by giving up the sails, even if Cain's lien had been only upon the sails.

4. It is insisted by the defendant's counsel, that as the lien of Cain turned out to be upon the boat as well as upon the sails, the plaintiff can recover only such proportion of Cain's claim as the value of the sails bears to the aggregate value of the boat and sails; and that as the boat was worth $400. and the sails $100. the plaintiff can recover only one-fifth of the amount of Cain's claim. But in order to entitle the defendant to an apportionment, it must appear that as between the defendant and the plaintiffs, there was a common duty resting on them to discharge the lien. Reynolds agreed "*to pay said Cain* and clear said sails from said Cain's incumbrance." No other mode of clearing the sails from the incumbrance, than by payment of the debt, would be a performance, unless it were equally beneficial to the plaintiffs. The defendant in this respect stands in the condition of Reynolds, because his undertaking is, that "Reynolds shall clear said canal boat from said William Cain's claim on said sails *as he has within agreed;*" that is, by paying the debt. As the defendant could not have satisfied his contract except by paying or extinguishing the whole debt, it is clear that as between the plaintiffs and the defendant, there was no common duty, and that there is no ground for an apportionment.

5. As to the alleged variance in the description of the defendant's guaranty, it cannot prevail. If there is such variance it might have been cured by an amendment of the declaration; and it is stated in the agreed statement of facts, that "the court is to render such judgment as is warranted by law upon the plaintiffs' declaration as the same now stands, *or as it might be amended.*"

There is no such misjoinder of parties as claimed by the defendant's counsel. The action is brought by the parties with whom the defendant and Reynolds contracted. The fact that one of the plaintiffs subsequently sold out his interest in the boat, and its appendages, including his interest in the contract of purchase, to one of the

other plaintiffs, and that the other plaintiffs made the whole payment to Cain, of his judgment, does not make him an improper party to the suit. The action is in the name of the parties having the legal interest in the contract.

The judgment of the county court is reversed, and judgment for the plaintiffs for the amount of the damages and costs recovered by Cain against Washburn, together with the plaintiffs' expenses in defending that suit.

JAMES JACKSON *v.* JOSEPH KIRBY.

Contract. Usury. Evidence. Pleading. Husband and Wife.

The plaintiff, on the 1st of April, 1856, purchased of the defendant and his wife the interest of the defendant's wife in the estate of her deceased father for $250.; the plaintiff thereupon executed to the defendant's wife a note for that sum payable on or before ten years from its date without interest, and also executed ten other notes for $20. each, payable one yearly during that period without interest, and the defendant and his wife executed an agreement under seal to deed said interest in said estate to the plaintiff when he should pay said note of $250., and also to give up to him all of said twenty dollar notes which should remain unpaid at the time he should pay said note of $250., and this agreement stated that the consideration of the note of $250. was "the sum which the plaintiff was to pay for the said farm." The plaintiff paid to the defendant one of the twenty dollar notes yearly for six years and on the 29th of August, 1862, paid him said note of $250. and so much of the seventh twenty dollar note as was in proportion to the year it was covering. *Held*, that this transaction was not upon its face usurious.

Held, that parol evidence was admissible to show that the twenty dollar notes were given for yearly interest on the note for $250. at the rate of eight per cent. per annum, and that there was no other consideration for them.

Held, that an action to recover the usury paid by the plaintiff was properly brought against the defendant alone.

It seems that under our statute usury may exist where a money debt is created and forborne by the agreement of the parties, even though there may be in such case no loan of money.

GENERAL ASSUMPSIT to recover money alleged to have been paid as usury. Plea, the general issue, and trial by jury, April Term, 1864, PIERPOINT, J., presiding.

It appeared on trial that at the time in question the wife of the

defendant was the sister of the plaintiff, and prior to April 1st, 1856, Jackson, the plaintiff's father, had died intestate, and thereupon certain real estate and some personal estate had descended to the plaintiff and to the wife of the defendant as heirs of Jackson the elder (in common with other heirs;) that on said 1st day of April, 1856, the parties mutually executed a bond or covenant in which the defendant Joseph Kirby and his wife Mary agreed to deed their right and claim to said real estate, which was the farm where Mrs. Ann Jackson then lived, to the plaintiff, James Jackson, when he should pay or cause to be paid a certain promissory note of even date with this agreement and given for two hundred and fifty dollars, and also agree to give up to the said Jackson all of ten promissory notes that should remain unpaid at the time Jackson should pay the two hundred and fifty dollar note, said ten notes being written for twenty dollars each and of even date with this agreement. And the said James Jackson in consideration thereof agreed to pay said Joseph and Mary the promissory note given for two hundred and fifty dollars,—the consideration of said note being the sum he was to pay for said real estate. And for the due performance of the several agreements, the parties bound themselves, their heirs and assigns in the penal sum of five hundred dollars.

This agreement was signed and sealed by the parties.

On that occasion the plaintiff executed to the defendant's wife a note for $250. payable on or before the expiration of ten years from said date and also ten twenty dollar notes payable one yearly during the same period, none of said notes bearing interest. The plaintiff thereupon entered into possession of the whole share of Mrs. Kirby in said estate of her father and has so continued in possession for his own benefit ever since. The plaintiff paid the defendant one of said twenty dollar notes yearly for six years, and on the 29th of August, 1862, paid up the two hundred and fifty dollar note and so much of the seventh twenty dollar note as was in proportion to the year it was covering, and thereupon the defendant and his wife conveyed to the plaintiff all the share of the defendant's wife in said estate of his father pursuant to the stipulations in said bond or covenant. And at the same time the residue of said twenty dollar notes was given up.

The plaintiff then testified in chief against the objection of the defendant that the two hundred and fifty dollar note was given for the price of said wife's share in said estate, and said twenty dollar notes were given for yearly interest on the two hundred and fifty dollar note at the rate of eight per cent. per annum, and that the bargain on the occasion of giving the notes and the execution of the bond or covenant, was that the plaintiff should pay on said agreed price interest at the rate of eight per cent. per annum until he should pay said price and take a conveyance of the property and that there was no other consideration for the twenty dollar notes.

On cross-examination the plaintiff testified that he raised no money from the defendant on loan or otherwise, that the transaction was a real business one for the purchase of said property, and that whenever he paid the notes as aforesaid the defendant and his wife were to convey the property which was all they were to do, and that on such payment they did do so. The plaintiff then rested.

No witness except the plaintiff was examined. No claim was made that the transaction was any cover made for the purpose of taking or concealing usury.

The defendant thereupon insisted that upon this evidence the action could not be maintained. And the court so decided, and directed a verdict for the defendant,—to which decision the plaintiff excepted.

Jeremiah French and *H. W. Dana*, for the plaintiff, maintained *first*, that this transaction was, upon its face, usurious. But *second*, whatever character may be given to the transaction on its face, the circumstances, when taken in connection with the plaintiff's evidence, if true, clearly make a case of usury.

The plaintiff's evidence was admissible. It did not vary, add to or contradict the written contract between the parties. It only tended to prove what the *consideration* for the twenty dollar notes really was. This is always proper. 1 Greenleaf's Ev. §§ 284, 304.

This evidence made out a case of usurious payments.

There is no necessity for any *loan of money;* the usury is complete when a money debt is created and foreborne; and, therefore, where, as in this case, the original contract by which the debt was created is for the purchase and sale of property, it is as much usury for the

vendor to demand and receive more than legal interest for the forbearance of such a debt, as it would be if there had been an actual lending of money. *Newkirk* v. *Burson*, 21 Ind. 129, see Monthly Law Reporter for February, 1864, p. 228; *Crawford* v. *Johnson*, 11 Ind. 28, 19 U. S. Dig. 679, § 26; *Parker* v. *Ramsbotton*, 3 B. & C. 257, 10 E. C. L. 69; *Thompson* v. *Nesbit*, 2 Rich. 73, 7 U. S. Dig. 476, § 12; *Ferguson* v. *Stilphen*, 3 Gilman, 547, 7 U. S. Dig. 476, § 19; *Tyson* v. *Ricard*, 3 Har. & J. 109, 3 U. S. Dig. 613, § 13; And see also *Carlis* v. *McLaughlin*, 1 D. Chip. 111, and *Whipple* v. *Powers*, 7 Vt. 457.

L. F. Wilbur and *G. F. Edmunds*, for the defendant.

The agreement between the parties was not usurious.

The plaintiff's evidence does not characterize the trade as usurious, taken in connection with the bond and other evidence. Chit. on Con. 6 Am. Ed. 703–4; *Agricultural Bank* v. *Bissell*, 12 Pick. 586; *Richards* v. *Brown*, Cowp. 770; *Morse* v. *Wilson*, 4 T. R. 356; *Floyes* v. *Edwards*, Cowp. 113–5; *Marisset* v. *King*, 1 Burr. 891.

The plaintiff's evidence "against the objection of the defendant" was inadmissible as it tended to vary the agreement as expressed in the bond.

It should be a joint action against the defendant and wife to enable the plaintiff to recover the usury if any.

KELLOGG, J. The contract out of which the alleged usurious interest in this case arose was for the purchase of property and not one of borrowing and lending money. It is not claimed that there was any *loan*, but it is insisted that there was an agreement for the sale of the property at the price of two hundred and fifty dollars, and that the ten twenty dollar notes—of which one was payable in each year successively for ten years,—were executed for the forbearance of the agreed price of the property for that period, and as interest on that price at the rate of eight per cent. per annum. The defendant's wife was a sister of the plaintiff, and the property purchased by the plaintiff was her interest or share in the estate of her father. On the occasion of the purchase, an agreement under seal was executed between the defendant and his wife on the one part and the plaintiff on the other, in which the defendant and his wife agreed, that, on the payment of a note for this sum of two hundred and

fifty dollars, they will convey to the defendant a farm which was part of the property purchased, and will give up to him all of the ten promissory notes then remaining unpaid; and this agreement also contains a recital that the consideration of the note for two hundred and fifty dollars was "the sum which the plaintiff was to pay for the said farm." This agreement does not determine the real character and substance of the transaction, so that the alleged usury can be said to be exposed on the face of the instrument. *Res ipsa non loquitur.* If the twenty dollar notes were in fact executed and received for the yearly *interest* on the purchase money of the property, and there was an agreement deferring the payment of this purchase money for ten years, or until the time when the note for two hundred and fifty dollars became payable, then they were clearly usurious. But if those notes constituted a part of the purchase money of the property, or if they were in good faith intended by the parties to represent the use or rent of the property while occupied by the plaintiff before he became entitled to a conveyance of it by the payment of the purchase money, then they should be regarded as being free from objection on the score of usury, and as containing no element of illegality. The agreement under seal is consistent with either view of the case, and the determination of these questions must rest on extrinsic evidence. If these twenty dollar notes were executed for the yearly *interest* on the purchase money, the transaction must be considered as usurious on its face, even though it was not intended as a cover for the purpose of taking or concealing usury.

By directing a verdict for the defendant, the county court proceeded on the ground that there was no evidence tending to show an existing debt from the plaintiff to the defendant and his wife, and the forbearance of such debt in consideration of an agreement for the payment of usurious interest on it. The payment of the note for two hundred and fifty dollars is the only condition precedent to the execution of the deed from the defendant and his wife to the plaintiff, according to the provisions of the contract under seal, but this is not conclusive in respect to the character or consideration of the twenty dollar notes. The plaintiff testified in chief that the two hundred and fifty dollar note was given for the price of the share of the defendant's wife in her father's estate, and that the twenty dollar

notes were given for *yearly interest* on the two hundred and fifty dollar note, at the rate of eight per cent. per annum, and that the bargain, on the occasion of the giving of the notes and the execution of the agreement under seal was that the plaintiff should pay on this agreed price interest at that rate until he should pay this price and take a conveyance of the property, and that there was no other consideration for the twenty dollar notes. We have no doubt that, under our statute, usury may exist where a money debt is created and forborne by the agreement of the parties, even though there may be in such case no loan of money; and we regard the plaintiff's testimony as tending to show the creation of a debt, and an agreement for the forbearance of it on a rate of interest which was illegal. This testimony had no tendency to vary the contract contained in the agreement under seal in respect to the consideration of the twenty dollar notes, or to contradict that agreement in any particular, and was clearly admissible. We think that it should have been submitted to the jury; and, on this ground the judgment of the county court is reversed.

It is objected on the part of the defendant, that this action should have been brought against himself and his wife jointly, and not against himself alone; but we think that this objection cannot be sustained without assuming the existence of facts which do not appear in the case. The defendant appears to have been a party to the original contract for the sale of the property to the plaintiff, and to the agreement under seal, and also to have received the money which was paid by the plaintiff on the notes, and that money may still remain in his possession; and no fact is stated which has any tendency to connect his wife with the plaintiff's cause of action except her interest, originally, in the consideration of the notes in question. This is not, of itself, sufficient to justify the conclusion that she had, at the time when this suit was commenced, a present interest in the subject matter of this litigation; and there is no evidence tending to show that she ever received any part of the money paid by the plaintiff to her husband on these notes.

Judgment of the county court reversed, and a new trial granted.

LOUIS F. THERASSON v. JAMES W. HICKOK.*

[IN CHANCERY.]

Assignment. Chancery. Statute of Limitations. Pleadings. Costs.

L. being insolvent, and his property attached, in February, 1849, made an assignment of all his attachable property, except an interest in western land of uncertain character and amount, to H., in trust for the benefit of certain attaching creditors therein named. At the same time he agreed upon terms of composition and settlement with the creditors, under which he was to execute certain notes to them severally, which they were to accept in discharge of their debts, and were to discontinue their suits, and release the attachments, and L. was to secure these notes by an assignment of his property. Said assignment was made in fulfilment of this agreement, and the assignee was directed to sell and dispose of the property assigned, and pay these notes in equal proportions out of the proceeds, as far as funds might be realized from the sales. *Held*, that this was a general assignment, and under the act of 1843 void as against creditors; that its character as an assignment was not affected by the contract of composition and settlement.

There being an express resulting trust in the instrument for the assignor, without any provision to pay creditors not named therein, it was also void at common law.

Prior to the assignment a creditor of the assignor not named therein, had commenced a suit against the assignor by attachment of his real estate, and pending the suit assigned his debt to the orator, who prosecuted the suit until 1858, when a non-suit was entered for reasons not affecting the validity of the debt, and immediately afterwards a new suit was commenced in the name of said creditor against L. to recover this debt, and all the real estate described in said assignment remaining unsold was attached as the property of L. In November following L. died, and the orator discontinued his suit and presented his claim to the commissioners on L.'s estate, which was allowed. The orator then brought a bill in chancery against the assignee and the administrators of L.'s estate, praying, in substance, among other things, that the assignment be decreed void as against the orator, and that his debt be paid out of the assigned property, with interest and costs. *Held*, that the orator cannot be regarded as having assented to the assignment, nor is his claim barred by the statute of limitations; but he is entitled to have the assignment set aside for his benefit.

Held, that the subject matter of the bill is clearly within the cognizance of a court of equity.

Held, that the creditors provided for in the assignment are not necessary parties to the bill.

Held, that the assignment is not void as to other persons who became creditors of L. subsequently to the making of it, nor is it to be set aside as a nullity between the parties to it.

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*This case was argued at the January Term, 1864; present, Ch. J. POLAND, and Judges ALDIS, BARRETT and KELLOGG.

Therasson *v.* Hickok.

The assignee is not answerable for payments made under the assignment before the filing of the orator's bill, nor should costs be charged against him; and he should be allowed his necessary expenses for converting into money that part of the assigned property still in his hands.

BILL IN CHANCERY. The case was heard at the September Term, 1863, PIERPOINT, J., presiding, upon the bill and answer of the defendant Hickok, and a statement of facts agreed upon by the parties, (all of which are sufficiently set forth in the opinion of the court,) and the court *pro forma* ordered and decreed that as to the defendant Hickok, the bill be dismissed, and that he recover his costs. From this decree the orator appealed.

Wires & Shaw and *E. J. Phelps*, for the orator.

The assignment was void as against the orator. 1. Under the statute of 1843, then in force, declaring all general assignments void. This was a general assignment within the meaning of that statute. It was by an insolvent for the benefit of creditors, and covered substantially all of his property. *Mussey* v. *Noyes et al.*, 26 Vt. 462; *Noyes et al.* v. *Hickok*, 27 Vt. 36; *Bishop, Smith & Co.* v. *Hart's Trustees*, 28 Vt. 73.

2. It was also void at common law, as containing an express resulting trust to the assignor, without providing for the payment of Linsley, who was a large creditor, or of other creditors not named in the assignment. *Dana, Adm'r*, v. *Lull*, 17 Vt. 390; *Goddard* v. *Hapgood & Tr.*, 25 Vt. 351.

It was never assented to by Linsley or the orator, directly or impliedly. *Camp* v. *Camp*, 5 Conn. 300; *Stewart* v. *Spenser*, 1 Curtis, 167.

The assignment thus void will be set aside in equity for the benefit of the orator. He has now no other remedy, as the death of Lovely dissolved the attachment. *Wakeman* v. *Grover*, 4 Paige, 23.

The defendant will not be allowed to charge as against the orator, payments made under the assignment, before the bringing of this bill. Burrill on Assignments, 557; *Wakeman* v. *Grover*, 4 Paige, 23; *Stewart* v. *McMinn*, 3 Watts & Serg't, 100; *Okie* v. *Kelly*, 12 Penn. 323; *Stewart et al.* v. *Spencer*, 1 Curt. C. C. Rep. 167; *Ward et al.* v. *Lewis*, 4 Pick. 518; *New England Bank* v. *Lewis*, 8 Pick. 120.

Nor for his own services and expenses in carrying out the assignment. *Hastings et al.* v. *Spencer*, 1 Curt. C. C. Rep. 504.

Creditors provided for under assignment not necessary parties. *Wakeman* v. *Grover*, 4 Paige, 23.

Daniel Roberts, for the defendant Hickok,

The conveyance in question does not fairly fall within the rules applicable to voluntary assignments in trust for creditors. Burrill on Assignments, 66, 320. The contract which preceded it, and other facts attending the transaction, make it otherwise.

If this could be regarded as an assignment falling within the statute of 1843, or subject to the statute against fraudulent conveyances, it was not a nullity, but only voidable by a creditor not assenting, through proper proceedings at a proper time. SPENCER, Ch. J., in *Anderson* v. *Roberts*, 18 Johns. 515; STORY, J., in *Bean* v. *Smith*, 2 Mason, 252; Roberts on Fraudulent Conveyances, 422, 423; *Fox* v. *Willis*, 1 Manning, (Mich.) 321; *Merrill* v. *Englesby*, 28 Vt. 150; *Edwards* v. *Mitchell*, 1 Gray, 239.

The legal validity of the conveyance should be tested by a proceeding at law. *Bishop et al.* v. *Hart's Tr.*, 28 Vt. 71; SPENCER, Ch. J., in *Anderson* v. *Roberts*, 18 Johns. 515, 527; *Edwards* v. *Mitchell*, 1 Gray 239.

A resort to chancery is not allowable in a case of this kind, at least until judgment at law is obtained. *Brinkerhoff* v. *Brown*, 4 Johns. Ch. 671; *Cropsey* v. *McKinney*, 30 Barb. 47; *Fox* v. *Willis*, 1 Manning, (Mich.) 321; Burrill on Assignments, 597; *Hastings* v. *Belknap*, 1 Denio, 190; *Higgins* v. *Armstrong*, 2 Johns. Ch. 144; *Rice* v. *Barnard*, 20 Vt. 479.

The probate court was the only proper tribunal for the orator to commence proceedings in. Genl. Stat. ch. 52, §43, *et seq.*; *Caswell* v. *Caswell*, 28 Maine, 232; *Adams* v. *Adams*, 22 Vt. 50.

The creditors named in the conveyance are necessary parties to the bill, and not being named therein the bill cannot be sustained. Burrill on Assignments, p. 599, citing, *Billups* v. *Sears*, 5 Grattan, 31, and *Stout* v. *Higbee's Ex'r*, 4 J. J. Marsh, 632.

The statute of limitations bars the suit. This statute applies as well in equity as at law. *Staniford* v. *Tuttle*, 4 Vt. 82; *Collard's Adm'r* v. *Tuttle*, 4 Vt. 491; *Tharp* v. *Tharp*, 15 Vt. 105.

Therasson v. Hickok.

KELLOGG, J. On the 13th February, 1849, Noble Lovely executed an instrument in writing, called an assignment, to the defendant Hickok, conveying all the attachable property which the assignor then had in this state or elsewhere, excepting an interest in western lands, of uncertain character and amount, in trust for the benefit of certain creditors of the assignor, eighteen in number. All of the attachable property which the assignor then had in this state was then under attachment on writs in favor of these creditors severally, and the assignor had agreed upon terms of composition and settlement with these creditors, under which he was to execute his notes to them severally for fifty cents on the dollar of their respective debts, payable in installments, and they were to accept these notes in discharge of their debts, respectively, and were to discontinue the suits commenced on these debts, and to release the attachments made in those suits, and he was to secure the payment of these notes by an assignment of all his property to the defendant Hickok in trust for the sole use and benefit of these creditors,—the assignee to sell and dispose of the property and, from or out of the proceeds of the sales, after deducting the expenses incident to the trust, to pay these notes in equal proportions, so far as funds might be realized from the sales. Before and at the time of making this assignment, Lovely was indebted to Caleb F. Linsley, of the city of New York, in about the sum of nine hundred dollars; and Linsley commenced a suit against Lovely to recover this debt, and, in this suit, the real estate of Lovely in Burlington was attached, prior to the making of the assignment. Subsequently, Linsley assigned his debt against Lovely to the orator for a good and valuable consideration, and this suit in favor of Linsley against Lovely was prosecuted, first by Linsley, and afterwards by the orator, until the September Term of the Chittenden County Court, in 1858, when a nonsuit was entered for reasons not affecting the validity of the debt. Immediately afterwards a new suit was commenced in the name of Linsley, against Lovely, to recover the same debt, returnable to the Chittenden County Court at the March Term, 1859, and, in this suit, all of the real estate described in the assignment executed by Lovely to Hickok which then remained unsold or undisposed of was attached as the property of Lovely. On the 14th November, 1858, Lovely died, and commis-

sioners of claims against his estate having been appointed, this last mentioned suit was discontinued under the statute. The orator presented the claim for the recovery of which these suits in favor of Linsley against Lovely were commenced to the commissioners of claims against Lovely's estate, and the claim was allowed at the sum of $1526.87, including interest to the 8th of June, 1859, in the name of Linsley as claimant, and the report of this allowance was duly returned to the probate court. It is not questioned that the orator is the rightful assignee of this claim, and is entitled to the same rights and remedies in respect to it which belonged to Linsley before his assignment of the claim, or which Linsley himself could enforce if he were living and had not assigned the claim; and it is admitted that the estate of Lovely is insolvent, and that nothing has been paid on account of this debt or its allowance. The orator's bill alleges that Lovely was insolvent when he made his assignment to Hickok;—that Hickok accepted the assignment, and received under it the possession of all the assigned property, and has sold and disposed of all or nearly all of the personal property and of a large portion of the real estate received by him under the assignment, and has reduced the same to money;—that the debt due from Lovely to Linsley was an existing and valid debt at the time when the assignment was made by Lovely to Hickok;—that no provision for the payment of this debt, or any part of it, was made in this assignment, and that this assignment was illegal, fraudulent, and void as to Linsley and the orator and all other creditors of Lovely who were not provided for in it;—and that the property conveyed by the assignment justly belongs to the administrators of the estate of Lovely for the benefit of creditors having claims allowed against his estate. And the orator prays that this assignment may be decreed to be void as against him, and may be set aside so far as it affects his right of payment out of the assigned property, and that the defendant Hickok may account under the direction of the court for all of the assigned property which was received by him, and the proceeds thereof, and may be decreed to transfer and pay over to the administrators of Lovely's estate the same or so much thereof as will be sufficient to pay the debt due to the orator as the assignee of Linsley, with the interest, and the costs and expenses of this suit; and that the ad-

ministrators may be decreed to receive the funds and take possession of the property, and pay to the orator the amount of his claim, interest, and costs out of the same, or that the defendants be decreed to dispose of the property and assets, and the proceeds thereof, according to law, and to permit the orator to share or participate therein, and to be paid out of the same, as in justice and equity he may be entitled in the judgment of the court. The cause stood for hearing, and was heard, on the bill, answer of the defendant Hickok, and a statement in writing of facts agreed on by the parties.

The first and principal question in this case relates to the character of the assignment by Lovely to the defendant Hickok, and its validity as against the right of Linsley, now represented by the orator. It is admitted that the assignment comprised all the attachable property of Lovely in this state or elsewhere, except an interest in western lands of uncertain character and amount; and, considering the instrument by itself, it can be regarded in no other light than as a trust assignment for the benefit of creditors. It contains the usual provisions authorizing the assignee to dispose of the assigned property, and to distribute the proceeds among certain creditors in proportion to the amount of their claims, and also an express provision that the assignee shall hold all of the property which shall come into his possession under the assignment in trust for the benefit of those creditors. The act of 1843, which was in force when this assignment was executed, provides that "all general assignments made by debtors for the benefit of creditors shall be null and void as against the creditors of said debtors." (C. S., p. 390, § 6.) In *Mussey et al.* v. *Noyes et al.*, 26 Vt. 462, it was said by REDFIELD, Ch. J., that "the term *general*, as applied to assignments, does not have reference, probably, so much to the proportion of creditors as to the proportion of property," and, in that case, the principle was recognized that if the assignment included *substantially* all of a debtor's property, *in trust for the benefit of his creditors*, it should be treated as being a general assignment within the sense and meaning of the statute. The same principle was recognized and re-affirmed in *Noyes & Co.* v. *Hickok, Trustee of Dow*, 27 Vt. 36, and in *Bishop, Smith & Co.* v. *Trustees of Hart*, 28 Vt. 71. When the whole of the debtor's attachable property is included in the assignment, and the

assignment is made in trust for the benefit of creditors, the case is brought within the rule of these decisions, and the character of the instrument is determined as that of a general assignment which, by the act referred to, is declared to be void as against creditors; and we regard the assignment in this case as being clearly of that character. We also regard it as being void at common law by reason of the express resulting trust for the assignor which is declared in the fourth section of the declaration of trust. That section provides that "if any money or other property remains in the possession of the trustee, after payment of expenses and the creditors as above set forth, the same shall be the property of said Lovely, and shall be conveyed to him by said trustee." There was no provision in the instrument for the payment of the debts due from Lovely to Linsley and the other creditors not named in the assignment, and the resulting trust in favor of Lovely contained in this section of the declaration of trust is not an implied but an express trust. A reservation of the residuum to the assignor without providing for all of the creditors before that residuum is to be paid to the assignor renders the assignment void. *Dana, Adm'r*, v. *Lull*, 17 Vt. 390; *Goddard* v. *Hapgood & Trustees*, 25 Vt. 351. This assignment, then, on its face, must be regarded as invalid as against the creditors of the assignor. But it is claimed on the part of the assignee that the contract between Lovely and those of his creditors who were provided for under it, and the other facts attending the transaction, are to be considered in determining the real character of the instrument. That contract was an agreement for a composition and settlement of the debts then due from Lovely to these creditors on certain specified terms, and it was a part of those terms that this instrument of assignment should be executed. Both the contract and the assignment bear the same date, and seem to have been executed at the same time; but the assignment makes no reference to the contract, and it stands as a complete and perfect instrument by itself, having every element of an assignment in trust for creditors, and its essential character was not affected because it was preceded by, or was cotemporaneous with, a contract made by Lovely with the creditors who were to be benefitted by it for a composition and settlement of the debts which he was then owing them. Each instrument was executed for a distinct pur-

pose, and there is no occasion to go beyond the text of either to determine its legal character and effect. The agreement for the composition and settlement of the debts did not, therefore, give any other or different character to the assignment than that which the assignment would be considered as having when standing by itself.

If this assignment was void as to the orator's assignor, who was a creditor of Lovely, the orator is entitled to have it set aside for his benefit, unless he has by some act assented to it, or has become barred by the statute of limitations. The attachment of the real estate of Lovely on the first suit in favor of Linsley against him was prior to the execution of the assignment by Lovely to Hickok, and the assignment was consequently subject to the lien of that attachment. As this lien of the attachment was the superior lien on the property attached, Linsley had no occasion to interfere with the assignment so long as the attachment was pending. His prosecution of the suit did not indicate a purpose to resist the assignment, because the assignment was no obstacle to the enforcement of his lien by the attachment whenever he should recover his judgment. A prosecution of the suit under such circumstances would indicate no more than a purpose to pursue the lien by the attachment. That Linsley never assented to the assignment is very certain, for the answer of Hickok says that he (Linsley,) was informed of the terms of the assignment and of his opportunity to become a party to the arrangement by signing the agreement for the composition and settlement of the debts against Lovely, and to take his share with the creditors under the assignment, but that, instead of doing this, he chose to rely upon and pursue the prior lien which he had acquired under his attachment. It also appears from the answer of Hickok that the suit in which that attachment was made was contested on the ground that it was brought before the maturity of the debt sought to be recovered in it; and it is agreed by the parties that there were three jury trials in that suit, one verdict having been rendered in favor of the plaintiff and two in favor of the defendant, of which the last was set aside by the supreme court, and that the evidence in respect to this ground of defence was conflicting. The entry of the nonsuit in that suit clearly resulted from a cause not affecting the validity of the claim embraced in the suit, inasmuch as

the orator immediately commenced a new suit in the name of Linsley against Lovely to collect the same debt, and, in this second suit, all the real estate then in the possession of Hickok as the assignee of Lovely, remaining undisposed of, was attached, but this suit was discontinued, agreeably to the provisions of the statute, on the decease of Lovely and the appointment of commissioners to allow claims against his estate, and the claim on which the suit was commenced was presented by the orator in the name of Linsley to the commissioners and allowed against Lovely's estate. Up to the time when the first suit was terminated, the assignment was subject to the attachment and prior lien of Linsley in that suit, but when the attachment in the second suit was made, this relation was changed, and the right acquired by the attachment became a right which was adversary or hostile to that which resulted from the assignment. The second attachment was a distinct notice from the orator to the defendant Hickok that the orator intended to pursue the attached property in defiance of and notwithstanding the assignment, but it cannot be regarded as a notice that he intended to rely upon or claim anything except the property which was attached; and it did not indicate any purpose on his part to interfere with the assignment in any other particular. We find no ground to claim that either Linsley or the orator ever assented to or recognized this assignment as a valid transfer of Lovely's property. On the contrary, both appear to have resisted and denied the validity of the assignment whenever there was any occasion calling on them to do so. The debt allowed in the name of Linsley against the estate of Lovely still remains an existing debt due to the orator as Linsley's assignee, and is a valid claim against Lovely's estate, and the assigned property now remaining in the hands of Hickok is, as to the orator's right, to be treated as the property of Lovely's estate. The debt and this assigned property being both in existence, as admitted by the answer, the remedies which the orator, as the assignee of Linsley, is entitled to pursue and enforce for the purpose of collecting the debt are not barred by the statute of limitations, or affected by the lapse of time. The utmost that can be claimed in behalf of the defendant Hickok in this respect is that the assignment should be treated as valid in respect to all which was done by him under it prior to the making

of the attachment in the second suit,—that attachment being the first act in the name or right of Linsley indicating a purpose to call in question or test the validity of the assignment.

The subject matter of the orator's bill is clearly within the cognizance of a court of equity, unless, as is claimed on the part of the defendant, the statute has vested an exclusive jurisdiction in such cases in the probate court. In respect to this part of the case, it is to be considered that the matter has now become one of a purely equitable nature,—the legal remedies against the assigned property by attachment and execution falling on the decease of Lovely and the appointment of commissioners of claims against his estate, and being no longer available to the orator,—and that the court of chancery has adequate means to give full redress to the orator and to all interested in the assigned property. The jurisdiction of the probate court, on the contrary, is specific and limited. That court is authorized by the statute, on application for that purpose, to grant a license to the administrator of a deceased person to sell and convey real estate previously conveyed by the deceased by a conveyance which is void as to creditors, when the estate so conveyed by the deceased would in his lifetime have been liable to attachment or the levy of an execution by a creditor for the purpose of making up any deficiency of assets in the hands of such administrator to pay the debts of the deceased; but it has no jurisdiction or control over such property beyond this specific purpose. It has no power to adjust any equities arising under the conveyance, and especially under a conveyance like the assignment in this case, and there is nothing in the statute provisions applicable to this subject which would imply that this remedy was intended to be exclusive. Those provisions merely furnish a mode, but not the exclusive mode, of subjecting such property to administration in the probate court, and do not derogate from, or affect, the general jurisdiction of the court of chancery over the same subject matter.

It is claimed on the part of the defendant that the creditors provided for in the assignment made by Lovely to Hickok are necessary parties to the orator's bill, and that the bill cannot be sustained without making them parties. This objection is not taken by demurrer or plea nor made in the answer, and might be disregarded for

this reason. 1 Daniell's Ch. Pr. (Perkins' third Am. Edit) 285, note 2. The whole subject of the controversy in this case arises out of the acts of the immediate parties to the assignment, and the equity of the orator does not necessarily depend on the question whether the debts due from Lovely to those creditors were valid or not. The assignment made by Lovely was void as to the creditors not provided for in it, even though the debts secured by it were valid and binding obligations against him; and, for this reason, it is not necessary to determine whether those debts were valid or not. In *Wakeman* v. *Grover et al.*, 4 Paige's Ch. 23, it was held that where a judgment creditor is acting in hostility to an assignment of the debtor's property, it is not necessary for him to make the creditors whose claims are provided for in the assignment parties to a suit to set aside the assignment as fraudulent, and that it is sufficient in a suit for that purpose to make the alleged fraudulent assignors and assignees parties. If the ground of relief relied on by the orator can be established, the creditors provided for in the assignment have no right to the assigned property; and it is sufficient to bring before the court such parties as are capable of litigating, and bound to litigate, in respect to the matter in controversy. It follows, therefore, that the creditors provided for by the assignment in question are not necessary parties to this suit, and that this objection ought not to be sustained.

For the reasons already stated, this assignment must be declared void as against the orator, who represents the right of a creditor of Lovely, the assignor, at the time when it was made, and the orator is entitled to the benefit of his diligence; but it is not to be treated as void as to the other persons who became creditors of Lovely subsequently to the making of it, nor is it to be set aside as a nullity between the parties to it. *Henriques* v. *Hone*, 2 Edw. Ch. 120, 123; Burrill on Assignments, p. 546. While declaring the assignment void as against the right of the orator, we do not think that he should be allowed to compel the defendant Hickok to account for so much of the assigned property, or the proceeds thereof, as had been appropriated, agreeably to its terms, towards the payment of the creditors provided for by it before the commencement of this suit. The attachment in the second suit at law, above mentioned, was

made on the real estate of Lovely then in the hands of Hickok as assignee and remaining undisposed of. This attachment was notice to Hickok that the orator intended to resort to the particular property which was attached for the purpose of satisfying his debt against Lovely, but it was not a notice that he intended to resort to any property which was not included in the attachment, nor did it indicate any purpose on his part to interfere with the assignment in respect to any other property except that which was covered by the attachment. This notice was the first notice to Hickok of the orator's purpose to call in question the validity of the assignment. The property included in this attachment remained in the possession of Hickok at the time of the commencement and filing of the orator's bill, and it is this property only which the orator is in equity entitled to have appropriated to the payment of his debt. As Hickok appears to have made a full and fair disclosure in respect to his proceedings under the assignment, and as nothing appears in the case which is calculated to impeach his good faith in those proceedings, he should not be held answerable for payments made by him under the assignment before he received notice of the orator's purpose to assail it. He should, consequently, be allowed, in the taking of the account, for all such payments made before the filing of the orator's bill, and also for his necessary expenses in converting into money that part of the assigned property which now remains in his possession; and, for the same reason, no costs should be allowed against him. In respect to the property now remaining in his hands as the assignee of Lovely, the creditors provided for by the assignment have no rights except such as must yield to the superior right of the orator; and, as it does not appear, and is not claimed, that there are any other creditors of Lovely except those who became such after the assignment was made, the orator is entitled to a decree which will secure the specific and exclusive application of the property, or its proceeds, to the payment of his debt.

The decree of the chancellor, *pro forma* dismissing the orator's bill with costs to the defendant Hickok is reversed, and the cause will be remitted to the court of chancery with directions to enter a decree setting aside the assignment from Lovely to Hickok, mentioned in the orator's bill, as being void only as against the orator, who is

the assignee and representative of the right of Linsley, and referring the case to a master to take an account of the amount due to the orator, as such assignee and representative of the right of Linsley, on the claim allowed in the name of Linsley against the estate of Lovely, as mentioned in the bill, and for interest thereon, and also an account of the assigned property and effects, and the proceeds of the same, in the possession of Hickok, and held by him under and by virtue of the assignment, after allowing him for all payments made previous to the commencement of this suit to the creditors of Lovely who were provided for in the assignment, and his necessary expenses and disbursements in collecting or converting the assigned property into money; and the master is to allow interest as shall be just, and also to tax the orator's costs in this suit; and on the coming in of the master's report, a decree is to be entered that the defendant Hickok shall pay or deliver over to the administrators of the estate of Lovely, the other defendants, the proceeds of the assigned property so found remaining in his possession as aforesaid, or so much thereof as will be sufficient to pay the debt due from the estate of Lovely to the orator as the assignee and representative of Linsley, with the interest, and the costs of this suit, and that the administrators of the estate of Lovely shall receive the same from the defendant Hickok, and pay the same over to the orator to be applied on account and in payment of his debt, interest, and costs, agreeably to the prayer of the orator's bill; and no costs are to be allowed against the defendant Hickok.

The title at the head of the above case should have been LOUIS F. THERASSON *v.* JAMES W. HICKOK, *and the Administrators of* NOBLE LOVELY'S *Estate.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF FRANKLIN,

AT THE

JANUARY TERM, 1865.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.

PASCHAL MILLER *v.* HORACE LIVINGSTON.

Jurisdiction.

Where on the face of the plaintiff's declaration the county court had jurisdiction, but upon his own evidence it appeared that his demand had been reduced by payment to fifty-six dollars, it was *held*, that this court had not original jurisdiction.

GENERAL ASSUMPSIT. Pleas, the general issue, payment and set-off.

The defendant moved to dismiss the action on the ground that the county court had not jurisdiction. The court at the April Term, 1864, ALDIS, J., presiding, *pro forma*, overruled the motion,—to which the defendant excepted. The facts are set forth in the opinion of the court.

H. S. Royce, for the defendant, cited *Strong* v. *McConnell*, 10 Vt. 231; *Chellis* v. *Woods*, 11 Vt. 466; *Hair* v. *Bell*, 6 Vt. 35; *Stevens* v. *Howe*, 6 Vt. 572; *Thompson* v. *Colony*, 6 Vt. 91; *Bank of Rutland* v. *Cramton*, 28 Vt. 330.

M. Buck, for the plaintiff, cited *Cooley* v. *Aiken*, 15 Vt. 322; *Stanley* v. *Barker et al.*, 25 Vt. 507; *Hall* v. *Wadsworth*, 28 Vt. 410; *Spafford* v. *Richardson*, 13 Vt. 224; *Farmers M. F. Ins. Co.* v. *Marshall*, 29 Vt. 23.

BARRETT, J. By the contract which was the basis of the plaintiff's cause of action, he was to have of the defendant $150. for erecting certain buildings, which he did erect according to the contract. Sixty dollars was to be, and was, paid during the progress of the work; and forty dollars was to be paid in cabinet ware on request; and the same was so paid, soon after the plaintiff had completed his work for the defendant, and before this suit was brought. The remaining fifty dollars was to be paid within sixty days after the completion of said work. This action was brought to recover that fifty dollars, and six dollars and seventy-five cents for extra work. This all appeared from the plaintiff's evidence, in the opening of his case. Whereupon the defendant moved to dismiss the action for want of original jurisdiction in the county court, to which the suit was brought. The motion was, *pro forma*, overruled. The only question is upon the action of the county court in overruling that motion; and this stands upon the state of the case at the time said motion was made, and unaffected by the result of the trial that proceeded under the pleadings.

The declaration was *indebitatus assumpsit* for work and labor, and the other general counts, alleging damages in the sum of five hundred dollars.

On the face of the declaration the county court had jurisdiction. But this is not conclusive of the question of jurisdiction.

In the action of book account, and in actions on promissory notes, the statute arbitrarily prescribes the criterion of jurisdiction. In other cases it is left to depend on the matter in demand. In the great variety of cases that have involved the question of jurisdiction there have been expressions in the published opinions, and perhaps there have been decisions, which seem to be incongruous, if not con-

flicting. Still upon the whole there seems to be a pretty well defined line of principle and adjudication to guide in the decision of the present case.

What is the meaning of "matter in demand," as used in the statute? It seems to us to be properly answered in legal phrase, by saying, it is the plaintiff's cause of action,—or, in other words, it is the claim which the plaintiff brings his suit for the purpose of enforcing. This of course is not measured and limited by the amount of ultimate recovery; but may be extended to what, upon the cause of action set forth and the evidence offered by the plaintiff, may constitute the ground and extent of his claim. In many cases that ground and that extent of claim may turn out to be much less than the plaintiff and his counsel supposed, either because the court should take a different view of the law, as to what constitutes a right of action, or as to the legal character and quality of the evidence relied upon to support such right of action, or as to the rule and measure of open and unliquidated damages. It is with reference to such cases that the judges have discoursed upon *good faith* in bringing the suit, as operating in favor of upholding jurisdiction. In such cases, if, upon the plaintiff's theory of his case, the court would have jurisdiction, then it is said that, if the plaintiff in good faith brings his suit in the county court, he is permitted to remain there and litigate his claim and right. This is well illustrated by several cases in our own reports,—particularly in actions sounding in *tort*, when damages beyond the value of the property in question are, within the province of the law, permissible to be recovered. The case of *Brainard* v. *Austin*, 17 Vt. 650, (an action of assumpsit,) well illustrates it; and what we regard as the true rule, and the good sense of the law, is clearly stated by Judge HEBARD in the opinion in that case. See p. 653.

In *Southwick et al.* v. *Merrill*, 3 Vt. 320, Ch. J. PRENTISS states, what we still regard as sound and unrepealed law, that, "when the want of jurisdiction appears from the face of the writ, the defendant may avail himself of the objection by plea; but when, from the writ, the court, *prima facie*, has jurisdiction, but it appears on trial, from the plaintiff's own showing, that his debt or demand is not of sufficient amount to give the court jurisdiction, the course is to dismiss the

action on motion. Such has always been the practice; and if it did not prevail, it would be in the power of the plaintiff to give the court jurisdiction, in evasion of the statutes, in any case, by merely declaring for or demanding a sum exceeding one hundred dollars.

The decision of the case, and the views presented by Ch. J. REDFIELD, in *Stanley* v. *Barker*, 25 Vt. 507, are in consonance with the cases above cited, and with what we have said on this subject. That was a case involving doubt as to the extent of the plaintiff's right. In one view which might honestly be taken, the case was within the jurisdiction of the county court. In another view it was not. Judge REDFIELD is not to be understood as placing the matter of jurisdiction upon the sole ground of *good faith*. Other elements must, in his opinion, conspire—such as the statute specially requires.

So the matter is presented by Judge BENNETT, in *Hall* v. *Wadsworth*, 28 Vt. 410. He says, "there is nothing in the case to show any bad faith in bringing this suit originally to the county court. That court has apparent jurisdiction on the face of the process; and though the referee finds that the largest sum which the plaintiff could have expected to recover for principal was less than one hundred dollars, yet when the claims were adjusted the amount of principal and interest exceeded one hundred dollars. The plaintiff might well have apprehended that such would be the fact when he commenced his suit."

In the light of the statute, and of the adjudged cases, we think it entirely clear that the county court had not jurisdiction of the present case. Upon the plaintiff's own showing, he not only could not, but knew he could not recover over some fifty-six dollars. That was all he claimed to be owing to him by the defendant; and it was for that alone that he brought his suit. That the original contract entitled him to be paid one hundred and fifty dollars did not enlarge his cause of action, after he had been paid one hundred dollars according to the provisions of the contract. This very point existed and was decided in *Southwick et al.* v. *Merrill*, 3 Vt. 320.

In that case the declaration was on a judgment for upwards of five hundred dollars—not setting forth that any payments had been made on it. When the record was produced in evidence it appeared that payments had been made and endorsed, so that the balance remain-

ing unpaid was less than one hundred dollars. The court held that the county court had not jurisdiction.

The language of Judge MATTOCKS, in *Stevens* v. *Howe*, 6 Vt. 572, is directly in point, and expresses the true view as to the effect of payments made and received on a previous debt, to the effect that they *pro tanto* extinguish it, and what is not paid is the debt or matter in demand, equally when the transaction all rests in parol, as when it is evidenced by writing or record.

The special plea of payment in bar, and the plea in offset *in bar* in this case, do not affect the question of jurisdiction, for their operation is only co-extensive with the plaintiff's cause of action and right of recovery. We are not called upon to consider or decide what might have been the effect of the plea in offset, if it closed with a prayer of judgment for any balance that might be found due to the defendant which is the only proper form of closing a plea in offset in this state under our statute.

On the whole then, the judgment is reversed, and judgment of non-suit is rendered in this court.

THE STATE OF VERMONT *v.* MARTHA D. CLARK.

Practice.

Exceptions to a charge must be taken, if at all, at the close of the charge, and before the jury retire from the jury box.

It is not the duty of the court to instruct the jury that they must not hold the law to be more unfavorable to the respondent than the court charged.

INDICTMENT for murder. Upon the trial no exception was taken by the respondent to the rulings of the court, except in the particulars hereinafter stated. The court charged the jury that they were judges of the law as well as of the facts; that it was the duty of the court to instruct them as to what the law was; that it was their duty to find and regard the law as it really was, and not as they might think it ought to be; but that they had the right if in their sound

judgment and conscientious belief they thought the law was different from what the court told them it was, to hold it to be thus different. To all this no exception was taken. The court omitted to tell the jury that they must not hold the law to be more unfavorable to the respondent than the court charged it to be; the respondent's counsel did not request the court so to charge, or to supply such omission. The jury returned a verdict of guilty of manslaughter. After verdict the counsel for the respondent excepted to the omission of the court to charge the jury that they must not hold the law to be more unfavorable to the respondent than the court charged it to be.

M. Buck, for the respondent.

——— ———, for the state.

BARRETT, J. It seems that no exception was taken to the charge of the court till after the verdict had been returned. It is an established rule, conformable to which the practice has been uniform so far as we know, that exception to a charge must be taken at the close of the charge, and before the jury retire from the jury-box. Under this rule the case is not properly before this court.

But if it was, in our opinion the point made is untenable. In the first place, it is not claimed that the instructions given to the jury are erroneous. In the next place, no aspect or posture of the case is presented, which required the court, as matter of legal duty, and without special request in that respect, to give the instruction, for the omission to give which the exception was prayed for. Error must be affirmatively shown in order to be available in this court. But again, we think it was not the duty of the county court, in any supposable aspect of the case, to give the instruction now claimed as necessary to have been given. It is inferable from the exceptions, that the respondent had invoked the exercise of the technical right and power of the jury to judge of the law as well as of the fact. We are not prepared to question the right of counsel to take this course. But when they do it, we are ignorant of any principle or precedent for holding that the court may be required to exercise any more restraint upon the jury, against the hazard of committing an error in the law prejudicial to the respondent, than of committing a like error to the prejudice of the prosecution. When the respondent, or learned counsel, presume to secure advantage by assuming the su-

periority of the jury over the court in their knowledge of the law of the case, and in their honesty and integrity in administering it, we think it unwarrantable to claim of the court any special immunity against the legitimate perils incident to such an experiment.

The exceptions are overruled, and the case is remanded to the county court for sentence.

B. W. FULLER *v.* WILLIAM A. JEWETT, AND HENRY C. COLCORD *Trustee.*

Trustee Process. Bounty Money. Agency.

C. at the request of J. received and invested J.'s bounty money and other pay due to him as a soldier in the United States military service, mingled the money with his own and took the securities therefor in his own name. *Held*, that C. is accountable only as J.'s agent and trustee; that the money so invested by C. is not subject to attachment in his hands by trustee process.

TRUSTEE PROCESS. The commissioner reported that the principal debtor, William A. Jewett, being entitled to a bounty of $100. from the town of Berkshire on account of his enlistment into the military service of the United States to the credit of that town, requested the alleged trustee "to draw his town bounty for him to let it out or keep it where it would be safe for him," and gave the trustee an order on the treasurer of the town for the same. This bounty was payable in four installments. He also ordered the state treasurer to pay to the trustee his allotted pay. The trustee received in all from both sources $241.70. He paid out of this, on orders of Jewett, $88.75. Of the residue he loaned $50. to the town of Berkshire and charged the same as of his own money, and after trustee process was served on him he took an order from the selectmen of the town payable to himself for said $50. and charged the amount to William A. Jewett in his account with him. He also loaned $100. of the residue to John A. Towle, and took a note signed by said Towle payable to the trustee or bearer, which note was not paid at the time of making the disclosure. The trustee was a farmer and inter-

mingled the money he received from his own products, with that received of the principal debtor so that it was quite impossible to tell one from the other.

The trustee claimed that he was not liable as trustee on the ground that he loaned the money as the mere agent of Jewett and had no interest in the securities, but held them for Jewett, and that the money received of the town was not subject to attachment by trustee process. The plaintiff insisted that he was liable on the ground that he had intermingled Jewett's money with his own, and had taken securities for it running to himself without the knowledge of Jewett, and that the town bounty having been paid by the town became attachable by trustee process.

The commissioner decided that the trustee was liable for what remained in his hands after deducting the sums paid on Jewett's orders, and the balance of the bounty money in his hands. Upon the hearing on the commissioner's report the court at the September Term, 1864, ALDIS, J., presiding, held that the trustee was not liable for an amount exceeding ten dollars, and therefore rendered judgment that he be discharged,—to which the plaintiff excepted.

D. R. Bailey, for the plaintiff, cited Paley on Agency, p. 90, and note, and *Floyd* v. *Day*, 3 Mass. 402.

M. J. Hill, for the trustee.

The trustee is not liable as the holder of securities for money belonging to the principle debtor. *Sargeant* v. *Leland & Tr.* 2 Vt. 277; *Hitchcock* v. *Egerton & Tr.*, 8 Vt. 202; *Scofield* v. *White's Tr's*, 29 Vt. 330; *Van Amee* v. *Jackson & Ketcham*, 35 Vt. 173.

The securities held by the trustee for loans to the town of Berkshire and J. A. Towle are protected to Jewett against Colcord's creditors. *Waldo* v. *Peck*, 7 Vt. 434; *Ridout* v. *Burton*, 27 Vt. 383; *Johnson* v. *Blackman*, 11 Conn. 342.

BARRETT, J. Colcord was constituted the agent of Jewett, to receive and invest his bounty money, and other pay that he should be entitled to, as a volunteer from Berkshire in the United States service.

In that capacity he received, in all, $241.70., with some two dollars interest. He paid out of this, on orders of Jewett, $88.75. Of

the residue, $50. was loaned to the town, and $100. to Towle; the three sums making $238.75.

In the relation Colcord sustained to Jewett, we do not regard him as being Jewett's *debtor* for the money so received, but his agent and trustee, and accountable, as such, for a faithful discharge of his duty. Accordingly the money received by him in that capacity was, and continued to be, Jewett's money, as were the securities taken by him therefor. The form in which Colcord kept his account of said money, or took the securities for it, did not change his relation and character.

It is settled by repeated decisions that a person cannot be charged as trustee, under our statute as to trustee process, on account of *choses in action*, which he holds for, or in the right of, the principal debtor.

Regarding the payments of the $88.75. to have been well made before the process was served, and that, as to $150., he had invested it and was the mere holder of the claim for, and in behalf of, Jewett, we think Colcord cannot be treated as having funds of Jewett of any kind in his hand to the amount of ten dollars when the process was served on him. He had no more afterwards.

It becomes unnecessary, therefore, to consider whether the bounty money was, as such, exempt from the trustee process, and equally unnecessary to make any computation as to what part of the invested money was bounty money.

The judgment discharging the trustee is affirmed.

Noble H. Buck *v.* Azro B. Ashley.

Sheriff. Trover.

The sheriff, but not the deputy, is liable for the loss of property attached by the deputy and left in an unsafe and unsuitable place, whence it was stolen.

The deputy is not liable for a mere *non feasance*.

The property being stolen and so beyond the control of the deputy, his refusal to deliver it to the party entitled to it, when demanded, was neither a conversion nor evidence of conversion.

Buck v. Ashley.

TROVER for a tub of butter. Plea, the general issue. Trial by jury September Term, 1864, ALDIS, J., presiding. The facts are fully stated in the opinion of the court.

Verdict for the plaintiff,—exceptions by the defendant.

O. W. Witters and *H. S. Royce*, for the defendant, insisted that this suit was sustainable only against the sheriff, and cited G. S. p. 88, § 24; *Abbott* v. *Kimball et al.*, 19 Vt. 551; *Hutchinson* v. *Parkhurst*, 1 Aik. 258.

Homer E. Hubbell, *M. Buck* and *Ira W. Clark*, for the plaintiff, insisted that trover could be sustained against the deputy. An attachment may be such a conversion as to enable one to sustain trover against the officer making it. 16 Conn. 346.

We claim that for the station agent's acts the defendant is alone responsible. *Gilbert & Wife* v. *J. J. Crandall*, 34 Vt. 188. That a demand and refusal are *prima facie* evidence of a conversion, and when proved by the plaintiff the burden of proof is on the defendant to show what disposition has been made of the property. 1 Smith's Leading Cases, 243; 2 Hilliard on Torts, 118, 119, 120; *Folsom* v. *Manchester*, 11 Cush. 334.

That the acts of the defendant constituted a conversion of the butter. Vermont Justice, p. 126; *Adams* v. *Abbot*, 2 Vt. 333; *Briggs* v. *Gleason*, 29 Vt. 78.

The defendant was a trespasser from the beginning in not having the butter attached forthcoming at the determination of the suit. *Bond et al.* v. *Wilder*, 16 Vt. 393.

POLAND, Ch. J. The defendant as deputy sheriff attached several tubs of butter and several boxes of cheese then in the freight depot at Milton, on a writ against the plaintiff, and left the property so attached, in said depot in the care of the station agent. The plaintiff settled the debt upon which the attachment was made, and the attachment was thereby ended. Upon going to the depot and calling for the butter and cheese so attached, the plaintiff found that one tub of the butter was missing; and both parties seem to have conceded that it had been stolen from the depot.

The plaintiff demanded the missing tub of butter of the defendant, but he was unable to deliver it, as it was out of his power to do so. The plaintiff claimed that the defendant was liable to pay for the lost

tub of butter, on the ground, that the freight depot was not a safe and suitable place to keep it, and that allowing it to remain there was such negligence in the officer, as made him liable for the loss; and the jury have found the negligence alleged.

This finding gives the plaintiff a right of action to recover for the butter, but the important question in the case is, whether it gives him an action against the defendant, or against his principal, the sheriff.

The statute, § 24, chap. 12, provides that "suits for any official misfeasance or neglect of a deputy sheriff, or for any cause affecting his administration of the office of sheriff shall be sustained only against the sheriff by whom he was appointed," &c.

That this negligence of the deputy in keeping property attached by him, is such an official default, that the sheriff might be sued and made liable therefor admits of no question, but the plaintiff claims that an action will also lie directly against the deputy.

It is doubtless true that there are cases where either may be sued, when the deputy in the course of his official conduct has been guilty of some positive and active tortious act. But can the deputy be sued when the complaint against him is for mere negligence, strictly a *non feasance*?

In the case of *Hutchinson* v. *Parkhurst*, 1 Aik. 258, it is said by SKINNER, Ch. J.: "In England no action for *neglect* of duty will lie against a deputy sheriff though such officer is liable for a tort committed by him. The distinction is that for *misfeasance* the deputy is liable as well as the sheriff; but for *non feasance*, the action must be against the sheriff. In the opinion of Lord HALE in Salk. 18, this distinction is clearly marked; he says the deputy is not chargeable as an officer, but as a wrong doer, that for a voluntary escape an action lies against the deputy, for it is in the nature of a rescue; but for a negligent escape the action lies only against the sheriff." And that case goes on to decide that under our statute the respective liabilities of the sheriff and his deputies are the same as held in the English law. In *Abbott* v. *Kimball et al.*, 19 Vt. 551, where a deputy sheriff had attached the plaintiff's harnesses, and had not kept them properly, whereby they had become injured, it was held that for such injury the plaintiff's remedy was against the sheriff,

and not the deputy. It was also said that it was not a conversion for which trover could be maintained.

And the same general doctrine is laid down in *Hale* v. *Huntley et al.*, 21 Vt. 147, and is the language of all our cases on the subject. In the present case, it was not claimed that the defendant had committed any tortious act, or been guilty of any positive wrong, but only that in the course of his duty as an officer in keeping attached property, he had omitted to put it in a safe and suitable place, an omission of duty, a *non feasance*, in the strictest sense.

Now whether such a negligence can be treated as a conversion, so that if the defendant had been sheriff, instead of sheriff's deputy, trover could have been maintained we have no occasion now to decide; but we regard it as clear under our statute and decisions, that no action whatever will lie against the deputy upon the facts proved in this case.

But the plaintiff claims that the refusal of the defendant to deliver the missing tub of butter to him when he demanded it, was a conversion. If the defendant had the butter then in his possession, and wilfully withheld it from the plaintiff, it would doubtless have been such a tortious act as would have made him liable, but as it was, the defendant's refusal to deliver it was neither a conversion, nor evidence of a conversion. There was no wrong in not delivering the butter to the plaintiff on his demand, for it was not in his possession or power to deliver, and this the plaintiff well knew and the reason why. It therefore added nothing to his liability; that depended wholly upon the manner in which the butter had got out of his possession and power to deliver. These views of the effect of a demand and refusal, when the party upon whom the demand is made has not the demanded property in his possession or under his control at the time, are fully supported by the case of *Rice* v. *Clark*, 8 Vt. 109.

Judgment reversed and case remanded.

LAWRENCE BRAINERD *v.* MORRIS CASEY AND OTHERS.

Costs. Trespass.

The statute which provides that each party shall recover costs upon the issues or claims on which he shall prevail, (G. S. p. 291, § 17,) is held to apply only in cases where the issues and claims are several and distinct, and has no reference to the constituent parts of a single general issue or claim; to those issues and claims made by the pleadings, and not to those arising on the testimony on trial.

In an action of trespass *qu. cl. fr.* commenced before the county court the main question was one of boundary between the land of the plaintiff and that of the defendant. The jury found that the line claimed by the defendant was the true line, but also found that the defendant had committed trespass by cutting trees to the value of $3.50 on the plaintiff's side of this line. *Held*, that under the statute, (G. S. p. 726, § 22,) the plaintiff could recover no more costs than damages.

TRESPASS *quare clausum fregit.* Plea, the general issue, and trial by jury, September Term, 1864, ALDIS, J., presiding.

The only question is as to the rule for the taxation of costs.

On the trial of this case the main dispute was as to the location of the dividing line between the land of the plaintiff and that of the defendant Casey, the question being as to where the east line of a forty acre lot, one-half of which belonged to the plaintiff, ran, going from the north-east corner of said lot southward to the south line. There was no dispute as to the position of said north-east corner.

Col. Green, a surveyor, called by the plaintiff as a witness, testified that the line from the north-east corner going south would take off a strip of land which the defendant Casey claimed, and which was about two rods wide at the south end of Brainerd's half of the forty acres, and about ten or twelve feet wide at the north end—the strip being about fifty rods long.

Leach, a surveyor, called by the defendant, testified that the line running from the north-east corner going south, would take the same strip off from Brainerd and give it to Casey.

Thus the dispute in the first instance was as to which of these surveyor's lines was correct—Brainerd claiming according to Green, and Casey according to Leach.

The strip of land in dispute and the land on each side of it was unenclosed wood-lands, used for nothing but wood. No question as to title by possession or acquiescence arose.

The plaintiff offered evidence tending to show that certain persons by Casey's directions cut a quantity of wood on the strip in dispute, to the value of about $40., and that they cut a few trees of small amount and value west of the Leach line, and on the land which Casey admitted to belong to Brainerd. The evidence on the part of Casey tended to show that no wood was cut west of the Leach line. Casey claimed the land as far west as the Leach line, and therefore that the wood that was cut stood on his land. Brainerd claimed east to the Green line.

The jury in rendering their verdict must have found that the Leach line was the true line between Brainerd and Casey. They rendered a verdict for the plaintiff for $3.40 damages, thus establishing the fact that that value of wood was cut west of the Leach line on land admitted to be Brainerd's. Upon this result the defendant Casey insisted that the plaintiff was not entitled to full costs but only to so much cost as damage, or else to have the costs apportioned upon the ground that Casey recovered as to the main question in issue, viz: the title to the strip in dispute.

The court decided that if the costs could be legally apportioned the plaintiff would be entitled to recover one-tenth of the amount of his taxable costs. But the court ruled *pro forma* that he was entitled to full costs,—to which the defendants excepted.

Edson & Rand and *Dewey & Noble*, for the defendants.

The question between the parties being one of *boundary merely*, and not of title or right of possession, the plaintiff is restricted from recovering more costs than damages, by General Statutes chap. 125, § 22, p. 726. *Powers* v. *Leach*, 22 Vt. 226; *Bishop* v. *Seeley*, 18 Conn. 389; *Arnold* v. *Kellogg*, 25 Conn. 248.

The defendant having recovered on the main question, equity and justice require the costs should be apportioned in accordance with the decision of the court below. G. S., ch. 33, § 18, p. 291.

M. Buck and *H. R. Beardsley*, for the plaintiff.

If the plaintiff's right either of title or possession was concerned he was entitled to full costs. G. S., p. 726, § 22; *Doubleday* v. *Marstin*, 27 Vt. 488; *Bachelder* v. *Green*, 38 N. H. 265.

This case did not involve the trial of several and distinct issues, nor of several and distinct claims so as to bring it within the statute di-

recting the court to tax costs for the party who prevails on the different issues or claims. G. S., p. 291, § 17. Otherwise every case tried in court would involve the distribution of costs.

KELLOGG, J. The issue in this case, as made by the pleadings, would be sustained on the part of the plaintiff by proof that the defendants had committed acts of trespass on any part of the close described in the declaration to which the plaintiff had the right of title or possession. It was single and distinct. The defendants did not, on the trial, contest or deny the right of the plaintiff to the land lying west of the Leach line, but did deny the fact of any trespass on that land. This denial was not connected with any claim of right on the part of the defendants, either of title or possession to any land west of the Leach line, and it did not appear that any such claim of right was ever at any time asserted by the defendants. The plaintiff claimed that the Green line, and not the Leach line, was the true division line between his land and that of the defendant Casey, and the controversy between the parties arose and depended mainly upon this question of boundary. The jury found, by their verdict, that the Leach line was the true division line, and, in this respect, their finding was against the claim of the plaintiff. But they further found that the defendants had cut wood to the value of three dollars and forty cents west of the Leach line, and on land which the defendants admitted to belong to the plaintiff, and in this respect their finding was in favor of the plaintiff. Upon the issue made by the pleadings, the plaintiff prevailed, notwithstanding the fact that a constituent and principal claim upon which he relied to sustain this issue was determined against him by the verdict. The questions presented by the exceptions are whether, under the statute, the case is one in which the costs of the suit can be apportioned between the parties; and, if not apportionable, whether the plaintiff is entitled to recover a larger sum for costs than for damages. The statute which provides that each party shall recover costs upon the issues or claims on which he shall prevail, (General Statutes, p. 291, § 17,) is applicable only in cases where the issues and claims are several and distinct, and has no reference to the constituent parts of a single general issue or claim. In this case, the trial was on a *single* issue, and the verdict was in favor of the plaintiff. If this issue was

divisible, it was not in fact divided in the pleadings; and we think that the statute was intended to apply to issues and claims made by the pleadings, and not to those arising on the testimony on the trial. In this view of the question, the case is not one in which the costs of the trial can be apportioned between the parties.

Is the case one which falls within the statute provision that in all actions of trespass on the freehold "other than those in which the right of title or possession of real estate shall *come in question*," commenced before the county court, unless the plaintiff shall recover more than seven dollars damages, he shall recover no more costs than damages? (G. S., p. 726, § 22.) In trespass to real property, the plea of the general issue not only puts in issue the fact of the trespass, but also the title, whether freehold or possessory, in the defendant or a person under whom he claims, may be given in evidence under it. 1 Chitty's Pl. 492. In every such action, therefore, "the right of title or possession" of the land *may* "come in question." On the trial, the defendants contested the fact of committing acts of trespass on the land west of the Leach Line, but did not contest or "question" the right of the plaintiff to that land. The plaintiff's right, both of title and possession, to that land was not brought in question on the trial, because it was admitted by the defendants; and the defendants limited their defence to a denial not of the plaintiff's right to the land, but of the fact of committing any acts of trespass on that land. The recovery of damages is for acts of trespass committed by the defendants, under no claim of title or right, on land which they conceded to belong to the plaintiff. The plaintiff's right of title and possession having been conceded by the defendants, it cannot be treated as having been brought "in question" at all, in the sense in which that term is used in the statute; and his claim for costs derives no support from the consideration that the defendants on the trial not only brought "in question," but successfully contested, the right which he claimed to the land lying east of the Leach line, and that the verdict of the jury was in favor of the defendants so far as the right of title or possession of any land was brought "in question" on the trial. The rules which should regulate the allowance of costs in the action of trespass on the freehold, under the provisions of the statute, received a very full considera-

tion in the case of *Powers et al.* v. *Leach*, 22 Vt. 226, and we regard the interpretation which the statute received in that case as being both sound and just. This construction of the statute limits and restricts the amount of costs which the plaintiff is entitled to recover to the amount of his recovery for damages.

The judgment of the county court in respect to the allowance of costs is reversed, and judgment is rendered in favor of the plaintiff for an amount of costs equal to, but not exceeding, the damages recovered by him; and, as the defendants have prevailed on their exceptions, they are to be allowed their costs in this court.

GILBERT WELLS AND OTHERS *v.* ESTATE OF ROSWELL WELLS.

Wills. Evidence.

W. devised by will all his property to his wife S. during her natural life, and, after her decease, to his adopted son George, on condition that he should be a faithful son. George lived with the testator until his decease, and with S. until she broke up housekeeping, always a faithful son, when by her consent, and in pursuance of an arrangement between herself and George's father, he returned to his father's at the age of nine years, and lived with him until the death of S., a period of several years. Soon after his return, S. and the father of George, by mutual consent, caused the articles of apprenticeship under which George went to live with W. at the age of three years, to be canceled. All these acts were done without consulting George, and without any reference to his wishes. *Held*, that his return to his father's was no violation of the condition of the will. Nor could the cancellation of the articles of apprenticeship affect the will.

The declarations of the testator, made subsequent to the execution of the will in question, to the effect that that will did not vary from a former will which he had made, are inadmissible to vary and alter the provisions of the last will, expressed in clear and explicit terms, without ambiguity.

APPEAL from the probate court, in ordering the distribution of the estate of Roswell S. Wells, deceased, to his adopted son George Carpenter. The facts in this case are fully set forth in the opinion of the court.

The county court at the April Term, 1864, ALDIS, J., presiding, held that neither the fact of George's leaving Mrs. Wells to reside with his father under the circumstances of the case, nor the cancel-

lation of the articles of apprenticeship, would operate to defeat his interests by the will, and that he was entitled to the property bequeathed to him by the will; and that the parol evidence offered to show that the testator did not intend to make any alterations in this will from a former will made in Canada, was inadmissible,—to all which the appellants excepted.

H. S. Royce and *B. Hall*, for the appellants, cited 2 Green. Ev. 690; *Blossom and others* v. *Griffin and another*, 13 N. Y. 569; *Ellis* v. *Essex Merrimac Bridge*, 2 Pick. 243; 1 Hilliard on Real Prop. 379, § 14; *Hogaboom* v. *Hall*, 24 Wend. 146.

Edson & Rand, for the appellees, cited 10 Conn. 62; 25 Vt. 238.

PIERPOINT, J. It appears from the exceptions that Roswell Wells, the testator, by his last will devised all his estate, both real and personal, after payment of his debts, to his wife, Sally Wells, during her natural life, and after her decease to his adopted son, George Carpenter, on condition that the said George Carpenter should continue a faithful son during the life of the said testator and his said wife. The said George, when two or three years of age, was apprenticed by his father to the testator, to be brought up and instructed by him in the business of farming, and continued to live with the testator up to the time of his death, and afterwards lived with the widow of the testator, "the said Sally," until she left her farm, broke up housekeeping, and went to live with her son-in-law; and then with the consent and under the direction of the said Sally, and in pursuance of an arrangement between the said Sally and the father of the said George, he returned to his father's house and continued to reside there until the death of the said Sally, a period of several years. Soon after the said return of the said George, the said Sally and the father of said George, by mutual consent, caused the said articles of apprenticeship to be canceled. All these acts appear to have been done without consulting the said George, and without any reference to his wishes in the matter, he being quite young. It does not appear that these arrangements were in any respect induced by any acts of the said George, inconsistent with his duties as a "faithful adopted son." Indeed it is not claimed that the said George was guilty of any act that was at variance with his duty to his parents by adoption, up to the time he left the said Sally

and returned to his father's. But it is insisted that such return was a violation of the condition upon which the property was devised to him, and operated a forfeiture of his right to the property under the will.

We are not able to concur in this view of the subject. George did not leave the said Sally in pursuance of any wish or will of his own, but simply acquiesced in the arrangement which she and his father had made in respect to him.

What considerations operated to induce the said Sally to enter into the arrangement do not appear, but it is reasonable to suppose that in view of the situation in which she was placed after the death of her husband, and her inability to afford George an opportunity to acquire a proper knowledge of the business of life, she thought it best for him, and perhaps for herself, that he should leave her and go to his father. That he complied certainly cannot be regarded as an undutiful or unfaithful act towards her, but the reverse. The fact that she afterwards caused the articles of apprenticeship to be canceled cannot affect this question; he had no connection with that transaction; it was her act, not his.

Had the testator, before making his will, known what would transpire after his death, he might not have made it, but that is not the question now. The will was made, and is established; its operation as to George was made to depend solely upon his future conduct towards the testator and his wife Sally during their lives. They being now both dead, and no act of unfaithfulness on the part of said George appearing, this provision of the will must have full operation. This view we think is in strict conformity with the intention of the testator as evidenced by the will itself, when considered in connection with his then existing relations, and all the surrounding circumstances as set forth in the bill of exceptions.

It is further claimed that the county court erred in excluding from their consideration certain evidence of the declarations of the testator, which was introduced upon the hearing, the trial being by the court.

This evidence consisted of the declarations of the testator made subsequent to the execution of the will in question, to the effect that his last will did not vary from a former will which he had made, from which in fact it did vary in some respects. To admit evidence

of this character to vary and alter the provisions of a will, that are clear and explicit in terms, and in regard to which there is no ambiguity, would be a direct violation of well established rules in regard to the admissibility of parol evidence. We think there was no error in this respect.

Judgment affirmed.

B. H. SMALLEY *v.* JOHN R. CORLISS.

[IN CHANCERY.]

Landlord and Tenant. Lease. Chancery.

Under a provision in a lease of a farm upon shares, that the lessor is to have one-half of the gross proceeds of the farm in lieu of interest, "and to have as much property and value in hay, seed, teams, tools and stock returned to the lessor at the expiration of said contract as he puts on to said farm and delivers over to the lessee," it was *held*, that the lessee was bound to return the property he received, or its equivalent in value, even though the loss or depreciation was wholly without his fault.

But where a portion of the stock was disposed of during the term of the lease by mutual consent, at a price less than the appraisal when the lessee received it, and the lessor received the proceeds, the lessee is not bound to make up for the deficiency.

Rule of practice upon appeal from chancery.

APPEAL FROM CHANCERY. It appeared from the bill and answer that the orator leased his farm in Swanton for one year from the 1st of March, 1860, to the defendant upon shares; and the orator complained that the defendant had not fulfilled certain stipulations of the lease, which the defendant denied. The lease provided that "the said farm is to be carried on and cultivated by said Corliss upon the principle that said Smalley is to furnish all the capital consisting of land, buildings, teams, seed, hay, stock and tools, now on said farm and necessary for its proper management and cultivation, and to receive one-half of the gross proceeds of said farm in lieu of interest, and to have as much property and value in hay, seed, teams, stock and tools returned to said Smalley at the expiration of said contract as he puts on to said farm and delivers over to said Corliss, and the

said Corliss is to receive the other half of said gross proceeds as a compensation for doing all the labor necessary to be done on said farm for its proper cultivation and management."

The next clause in the contract in relation to return of property is as follows:

"Said Corliss is to leave at the expiration of this contract upon said farm for the use of said Smalley, as much value in seed and grain, teams, stock and tools as he received from said Smalley."

There was also the further provision in the lease as follows:

"If after examining the crops of hay and grain and roots raised on the premises next fall said Smalley and Corliss shall be of the opinion that there is not fodder enough to keep the stock, enough of the stock is to be sold so as to reduce the stock to the quantity of fodder." The lease also provided that, "the two log houses on the west side of the road said Corliss is to have for the use of his men, if he desires it."

The case was referred to special masters to take the account between the parties. It appeared from their report in respect to the items of account in dispute, and which each party claimed under the said provisions of the lease, as follows:

The defendant received of the plaintiff under the lease on the 1st of March, 1860, thirty cows, which were worth at that time $30. each. The defendant returned to the plaintiff twenty-seven of these cows on the 1st of March, 1861, and these cows so returned were then worth $30. each, less $5.98, as hereinafter stated. One of the said thirty cows so received by the defendant died in May, 1860, of disease, without any fault of the plaintiff or defendant, and was then worth $30. Two of the thirty cows were appraised and were worth $22. each in the fall, and then fattened by materials produced on the farm, and killed by the consent of both parties, and were worth when killed, December 6th, 1860, $35., which the plaintiff received. The defendant claimed one-half of the increase by fattening said cows, which was allowed at $6.50. The plaintiff claimed the value of these two cows at the time the defendant re-received them, deducting the amount of their value when killed. His claim under the masters' finding of the value was $25., which was disallowed.

Two of the twenty-seven cows returned were farrow when returned, but not by any fault or want of care on the part of the defendant; on this account their value was, when returned, $30., and the difference between their value when received by the defendant and returned to the plaintiff was $30., which the plaintiff claimed, but the claim was disallowed.

The defendant also received of the plaintiff under said lease a horse named "Robin," worth $75. This horse when in the charge of the defendant's servant, in use on the farm, was drowned, in April, 1860, and the plaintiff claimed his value, which was not allowed.

Another horse called "Tom," depreciated in value $7. while the defendant had him under the lease, by reason of increased age, which amount the plaintiff claimed, and the claim was disallowed. And another horse called "Jack" depreciated $5. on account of increased age, which was disallowed to the plaintiff.

The defendant also received a breeding mare on the 1st of March, 1860, with foal, then worth $75., and returned her on the 1st of March, 1861, then worth twenty dollars less on account of her not being with foal, but she was without foal by no fault of the defendant, and the claim for depreciation in value was disallowed.

One two-year-old heifer died in June, 1860, by accident, without fault of the plaintiff or the defendant. She was then worth $18., which the plaintiff claimed, and the claim was disallowed, except her hide, valued at $2.93.

Twenty-four head of young stock were sold in the fall of 1860 by the plaintiff, (who received the money), on account of a deficiency of forage on the farm to keep them with other stock not sold, and so sold without the consent of the defendant. They were sold for $42. less than their value when the defendant received them. Both parties agreed in the fall of 1860 that there was not fodder enough on the farm to keep the stock, but they could not agree what stock should be sold, and thereupon the plaintiff took the responsibility of selling as aforesaid. No more stock was sold, including all that was sold, than was necessary to adapt the fodder to the stock retained. The defendant insisted that some of the cows should be sold in lieu of the young stock that was sold. The plaintiff claimed for the loss of the $42., which was disallowed.

The defendant received a three-year-old bull, worth $25., and he was sold by consent of both parties in the fall of 1860 for $15., which was his worth then. The plaintiff claimed for the difference, which was disallowed.

The masters also allowed the plaintiff's items, Nos. 36 and 37, $6. each, for garden spots and firewood for two hired men of the defendant, "Levi" and "Jerry."

The orator excepted to the masters' report because they allowed to the defendant the item numbered 18 in the defendant's account at $6.50, for fattening two cows; and because they disallowed the orator's claims for—

1. The value of the cow that died in May, 1860, $30.00.
2. The difference in value between the two cows that were fattened, when returned to the orator and when received from him, 25.00.
3. The difference in value between the two farrow cows of the twenty-seven cows returned, when received by Corliss and when returned to Smalley, 30.00.
4. The value of the horse "Robin" that was drowned, 75.00.
5. The depreciation of the horse "Tom" on account of age, 7.00.
6. The depreciation of "Jack" on account of age, 5.00.
7. The difference in value of the breeding mare when received and when returned, 20.00.
8. Loss on stock sold in fall of 1860 for the want of sufficient forage, 42.00.
9. Loss of two-year-old heifer that died, 10.07.
10. Loss on bull sold, 10.00.

The orator claimed that the foregoing items should have been allowed him by virtue of the aforesaid provision in the lease; that by the true construction of the lease the defendant was bound to return to the plaintiff at the expiration of the lease an amount *in value* of hay, seed, teams, tools and stock equal to the amount in value of the same articles put on to the farm and delivered to the defendant.

The defendant denied that this was the true meaning of the lease, and claimed that if the same property that was received was re-

turned, and the difference in value was caused by increase of age or other causes over which he had no control, and for which he was in no fault; or if he was prevented from returning the animals received by their death from natural disease or inevitable accident, the defendant being in no fault therefor,—then he ought not to be charged for their value or the difference in value; and that these items in the orator's account came under this head and were therefore properly disallowed.

The chancellor considered that the proper construction of the lease was as the orator claimed it to be; that the items herein-before stated, as follows: No. 1, at $30.; No. 2, at $25.; No. 3, at $30.; No. 4, at $75.; No. 5, at $7.; No. 6, at $5.; No. 7, at $20.; No. 9, at $10.07.; No. 10, at $10., ought by this construction of the lease to be allowed to the orator. No. 8, at $42., was properly disallowed.

The chancellor also disallowed the $6.50, (item 18 of the defendant's account, for the increase on two cows fattened.)

The only exception taken by the defendant to the report was for the allowance of items 36 and 37, each for $6., which the chancellor disallowed.

———, for the orator.

H. C. Royce and *H. A. Burt*, for the defendant.

POLAND, Ch. J. 1. The first and principal question is as to the construction of the lease from the orator to the defendant.

The lease provides that Smalley is to have one-half of the gross proceeds of said farm in lieu of interest, "and to have as much property and value in hay, seed, teams, tools and stock returned to said Smalley at the expiration of said contract as he puts on to said farm and delivers over to said Corliss." And it is again repeated in the lease, "said Corliss is to leave at the expiration of this contract upon said farm for the use of said Smalley, as much value in seed and grain, team, stock and tools as he receives from the said Smalley."

It is not claimed but that in a contract for the leasing of a farm and the stock upon it, it is perfectly competent for the parties to contract that the tenant shall insure to the landlord the return of all the stock or other property on the farm, or its value, even though it may

be lost, or depreciate in value, without any fault on his part, or by inevitable accident.

It is claimed, however, by the defendant, that such stipulation is so unusual in this class of contracts, and operates so severely upon the defendant in this case, that the language used, and quoted above, should not be construed to mean this, but only to throw upon the defendant, in case of any loss or depreciation, the burthen of proving that it was occasioned without his fault. But it appears to us that the language of the contract is so clear and distinct, and so entirely unequivocal in its meaning, that no room is afforded for a construction any more favorable to the defendant, than that he bound himself to return the property he received, or its equivalent in value, even though the loss or depreciation was wholly without fault of his. Nor have we been able to see that the clauses above cited are so controlled or modified by other provisions and clauses of the lease as to vary this plain signification.

This was the construction given to the lease by the chancellor, and his allowances of items in the orator's account, which were objected to by the defendant, we regard as correct, with two exceptions. These are the charges of $25. for the loss on the two cows fattened and killed, and $10. for loss on the bull sold. The masters' report states that by the mutual agreement of both parties the cows were fattened and killed in the fall of 1860, and produced but $35. which the orator had, though their value the spring before was $60.

The bull was worth $25. in the spring, but by mutual agreement he was sold in the fall for but $15.

The chancellor allowed to the orator his charges for these losses as properly recoverable under this provision of the lease. It seems to us this allowance was improper.

This disposition of the two cows and bull, clearly excused the defendant from restoring them to the orator at the end of the term, and, as we think, from returning any equivalent for them then. In effect it took them out of the contract of lease, and made a new contract as to them, and another and different disposition of them. We cannot say but this disposition of these animals at these prices was more beneficial to the orator than to have had them kept until spring and then returned to him. Nor can we say but such new disposi-

tion was more detrimental to the defendant than it would have been to have fulfilled his original agreement as to them.

Each party ran his own risk as to making or losing by this new and different arrangement as to these animals, and as that new arrangement was perfected and carried out, neither can resort to the original provision in the lease governing them.

The chancellor's decree disallows two items of the orator's account, Nos. 36 and 37, of $6. each, "for garden spots and firewood for Levi," and "same for Jerry."

The lease makes no provision that the defendant's hired men or tenants are to be furnished with firewood and gardens without charge, and as the masters find that they had such from the orator, these should have been allowed.

The orator also objects to the allowance of two items in the defendant's account,—No. 4, for work, allowed by masters at $34.50, and No. 26, for hay and straw left on the place, allowed at $50. But we think these items are not properly open to revision here. It is true that an appeal of a chancery suit brings the whole case before this court, as it stood before the chancellor, and the court may as properly vary the decree against the party appealing as in his favor. But on an appeal, this court takes the place of the chancellor, and when it would not be proper for the chancellor to disturb an allowance of masters at the hearing before him, it would be equally the duty of this court not to do so. When an account has been taken and returned by a master, regularly, either party desiring to object to the allowance of any item should file his exceptions to the masters' report, specifying the items objected to, and the grounds of objection. On hearing, it is not the duty of the chancellor to examine items not thus excepted to, and on appeal the duty of this court does not extend beyond that of the chancellor.

In this case no written exceptions were filed, but at the hearing before the chancellor, each party excepted orally to such allowances as the masters had made which he was dissatisfied with, and all these exceptions were stated in the chancellor's decree. The chancellor was not bound to examine any items that were not thus excepted to, and on appeal from his decree, the hearing must have the same limitation.

The chancellor's decree is reversed, and the case remanded, with directions to disallow in the plaintiff's account, said item of $25. for "loss on two cows fattened," and the item of $10. for "loss on bull," and to allow to the plaintiff the two items of $6. each for firewood and gardens for hired men, and to allow the residue of accounts as in former decree, and make decree accordingly.

WILLIAM MULLEN *v.* R. R. SHERMAN, *Appellant.*

Trover. Lottery.

By artifice and falsehood the plaintiff got possession of a gift enterprise ticket, so called, belonging to W., a minor, which entitled the holder to certain articles, and when drawn took them into his possession. The defendant, an officer, then attached and carried away said articles upon a writ in favor of W.'s father against the plaintiff, by the father's direction, and delivered them to his possession. He, the father, then discontinued his suit, having instituted it merely to get possession of said articles. *Held*, that in the absence of proof to the contrary, the defendant is entitled to the presumption that he acted in good faith, and strictly within the limit of his official duty, in serving said writ as he did; that upon a discontinuance of said suit, it was his duty to deliver the property to the person legally entitled to it; and that the property clearly belonged to W.

TROVER for a bedstead, washstand, bureau and two chairs. Plea, not guilty. Trial by the court, September Term, 1864, ALDIS, J., presiding.

The plaintiff offered evidence tending to show that the defendant, as sheriff, attached and carried away the chamber set described in the plaintiff's declaration, upon a writ in favor of Dr. Woodward against the plaintiff; that when attached they were in the possession of the plaintiff; that the defendant attached them by the direction of Dr. Woodward, and delivered possession of the articles to him; that Dr. Woodward claimed to own them, and instituted the suit merely to get possession of them, and as soon as he got possession of them discontinued his suit, not claiming to have any real cause of action against the plaintiff for which the suit was brought; that he had demanded the property back of Sherman, the sheriff, who referred him to Dr. Woodward, who had possession of the property and claimed

to own it; and that the sheriff on such demand did not return the property,—with proof of value he rested his case.

The court found the facts to be as the evidence offered tended to show.

The defendant then introduced evidence tending to prove, and from which the court found proved, the following facts. A showman, calling himself Prof. King, exhibited various tricks of legerdemain and performances of ventriloquism at the village of St. Albans, and had connected with this what was called a gift enterprise, which was an arrangement adopted to induce people to attend the show, and under which each one that attended would, after entering the hall, draw from a certain box an envelope containing a ticket, and if it was numbered, the holder became entitled to some gift, so called, and these gifts were distributed at the close of the exhibition.

Fred. Woodward, a son of Dr. Woodward, and about thirteen years of age, went to the show, bought a ticket of admission, went in, drew his envelope, and found himself the holder of ticket No. 64. He took a front seat near the stage, the plaintiff sat directly behind him. The plaintiff looked over the boy's shoulder and saw his ticket with a number on it, and asked the boy to let him look at it. The boy hesitated but finally let the plaintiff take the ticket. The plaintiff then asked him if he would sell it. The boy said "No, he did not want to sell it, he wanted to keep it and see what it would draw." The plaintiff said he would give him a quarter of a dollar for the ticket; the boy said he did not want to sell it. The plaintiff then put a quarter of a dollar into the boy's lap, and told him he would give him whatever the ticket drew. The boy several times asked for the ticket, and the plaintiff would reply, "you are all right,—you have the quarter and I have the ticket,—I will give you whatever the ticket draws." This he continued to say to the boy to quiet him till the show was over and the drawing of the gifts was about to begin. This was said after the drawing began. Soon No. 64 was drawn, and Prof. King announced that the fortunate holder of it had drawn a set of chamber furniture. The plaintiff having the ticket in his possession, claimed the furniture and got possession of it, and carried it to his rooms. The court finds that the plaintiff obtained the ticket from the boy by artifice, and kept it

by falsely pretending to the boy he should have what it would draw; that the boy did not consent that he should keep the ticket, or what it would draw, and that the plaintiff wrongfully got and kept the ticket, and thereby wrongfully and without right got and kept the furniture which the ticket drew.

The court rendered judgment for the defendant for his costs,—to which the plaintiff excepted.

M. Buck, for the plaintiff, maintained that Woodward has no title or right to the chamber set in question. 1st. Because he never acquired it by gift, purchase, or other legal transaction. 2d. The proceedings by which Dr. Woodward claims to have acquired title to the furniture are in contravention of the statutes of this state, and therefore illegal. See G. S., p. 692, §§ 5 and 6; *Dixon* v. *Olmstead*, 9 Vt. 310. 3d. All contracts made in connection with and based upon such illegal transactions, are void and cannot be enforced at law. The maxim, "*ex terpe causa*," &c., applies.

Upon the discontinuance of the suit the officer should have returned the property to the plaintiff. *Baker* v. *Fuller*, 21 Pick, 318; *Briggs* v. *Gleason*, 29 Vt. 78.

Edson & Rand, for the defendant, maintained that this enterprise was not in violation of the statute. G. S., p. 692, §§ 5 and 6. The title to the furniture and the right to its possession was in Dr. Woodward or his son, and in getting possession they merely exercised the right of recaption in a peaceable manner. *Mussey* v. *Scott*, 32 Vt. 82; *Wilson* v. *Hooper et al.*, 12 Vt. 655. The defendant not liable in trover. *Knapp* v. *Winchester*, 11 Vt. 351; *Yale* v. *Saunders*, 16 Vt. 243; *Nutt* v. *Wheeler*, 30 Vt. 436; *Abbott* v. *Kimball*, 19 Vt. 558; *Stoughton* v. *Mott*, 25 Vt. 672; is not liable at all, as the case finds that the plaintiff was not the owner of the articles attached. *Soper* v. *Sumner*, 5 Vt. 274; *Paul* v. *Slason*, 22 Vt. 231.

It does not appear but that the defendant, in making the attachment, acted in good faith, and this court will not presume to the contrary.

KELLOGG, J. This case presents three questions, upon the decision of which the judgment depends.

I. It does not appear that the defendant was privy to the purpose of Dr. Woodward in commencing the suit against the plaintiff merely

to get possession of the property in controversy. We are to assume, therefore, that the defendant acted in good faith in making the attachment on that writ; and he is not to be affected or prejudiced by the fact that Doctor Woodward adopted means to obtain possession of the property which, under ordinary circumstances could not be looked upon with any degree of favor. The defendant is consequently entitled to the presumption that he acted in good faith, and strictly within the line of his official duty, in making service of the writ in favor of Doctor Woodward against the plaintiff.

II. When that suit was discontinued, it was the duty of the sheriff to deliver the property to the person who was legally entitled to it. If the property was then in the possession of the party to whom it rightfully belonged, and the plaintiff had no legal title or right to it, there was no conversion of it by the defendant in refusing to deliver it back to the plaintiff on his demand.

III. On the facts found by the county court, the property clearly belonged to Doctor Woodward's son, and the plaintiff stood as a self-constituted agent of the son in receiving the property on the ticket. In law, his possession of the property should be regarded as a possession in the right and for the use of the son. The plaintiff obtained the possession of the ticket by a false pretence, and kept that possession against the will of the person who was legally entitled to it. If the gift distribution was illegal, it was no concern of his except in respect to his own ticket. He was not only a *particeps* in the guilt of the enterprise, but he also undertook to acquire by deception and falsehood a right which belonged to the boy alone. He has no right to appeal to a court of justice to aid him in his attempt to take advantage of his own wrong.

Judgment of the county court for the defendant affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF GRAND ISLE,

AT THE

JANUARY TERM, 1865.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.

W. W. RUSSELL *v.* JAMES DODDS.

Prudential Committee. Schools. Trespass.

If a prudential committee agree to let a party have the district school house for a private school during a vacation of the usual district school, and the party act upon the agreement, the committee cannot revoke it, without cause, nor can he allege his want of legal authority to make it in an action of trespass against him for forcibly preventing the party from continuing his school during the period agreed upon.

TRESPASS for an assault and battery. The case was heard on demurrer to the replication. The facts set forth by the plea and

replication are fully stated in the opinion of the court. At the February Term, 1864, ALDIS, J., presiding, the court *pro forma* held the replication insufficient, and rendered judgment for the defendant, —to which the plaintiff excepted.

G. Harrington and *George F. Houghton*, for the plaintiff.

H. R. Beardsley, for the defendant.

POLAND, Ch. J. The plea and replication in this case show the following state of facts. In the fall of 1862, and in the interval between the usual summer and winter schools, Hutchins proposed to open in the district school house, a private school for the children of the district and vicinity, and this object was generally concurred in and approbated by the inhabitants and voters of the district, though no corporate action was had on the subject. For this purpose Hutchins applied to the defendant who was the prudential committee of the district, for the use of the school house, and thereupon the defendant agreed with Hutchins that he might have the school house for his school for the period of eleven weeks. Hutchins thereupon made his arrangements, took possession of the school house and opened his school.

After the school had continued for some weeks, the defendant for no alleged reason, in the absence of Hutchins and his pupils from the school house, fastened the door of the house. Hutchins found the house fastened, and was forbidden by the defendant to enter, but he undertook to do so, and the plaintiff to aid him in so doing. The defendant attempted by force to prevent them from entering, and to some extent used personal violence for that purpose.

The question presented by the case is, whether upon this state of facts the force so used by the defendant was lawful or unlawful.

The argument on the part of the defendant has gone mainly upon his want of authority to make any such contract with Hutchins for the use of the house, for such purpose, and that at most it was a mere license, which he might revoke at any time, and resume possession in himself. The purpose for which school districts are required to build school houses, is to accommodate schools which are supported by the district, and which they are required by law to maintain, but the general object of all these requirements of the law, is the education of the children.

Hence it was held in *Chaplin et al.* v. *Hill et al.*, 24 Vt. 528, that a private school not supported by a tax on the district, might by consent of the district be held in the school house, that such a school was for the furtherance of the general object and design of such erections, and so no unlawful use of the house, and that the prudential committee to whom by law the general care of the house is given, had no legal right to prevent the house being used for that purpose. If the district might properly and legally allow the house to be used for such purpose, we think in the absence of any dissent by the district, the prudential committee might do the same thing, and give permission to use the house for the same object, and especially if it was generally approved by the voters and tax-payers of the district.

It is said in the case of *Chaplin et al.* v. *Hill et al.*, above cited, that the district may allow the school house to be used for a private school for *the time being merely*, but cannot confer the exclusive use of the house upon any one for any definite time. But we apprehend that what is meant by this is, that the district may not part with the use and power of control over the house permanently, or for any such length of time as to prevent the house from being used for the purpose of a district school, for which it is specially erected. If they may part with it at all, we see no reason why they may not part with it for such limited period as will not interfere with their legitimate and proper use of it as a district school house.

But however this may be, the defendant in this case assumed to agree with Hutchins that he should have the use of the house for his school for the period of eleven weeks. Hutchins had acted upon this agreement, got up his school, and taken possession of the house, and was fully performing on his part. If his school was broken up before its intended termination, it might, and doubtless would be a serious loss to him, as well as to his pupils. Whether the defendant had exceeded his proper authority in agreeing to let him have the house for eleven weeks, or not, we think it does not lie in the defendant's mouth, to say that he had no authority to make such agreement, and that therefore he will violate and repudiate it. If the district, his principal, was content, he was bound to be.

So far as the defendant is concerned, it is the same as if he had himself been the owner of the house, and made such contract; having

made such contract, and Hutchins having acted upon it, taken possession of the house and opened his school, the agreement was not revokable by the defendant without cause, nor can he allege his want of legal authority to make the agreement. Hence when he undertook forcibly to prevent Hutchins from continuing his school in the house, during the period he had agreed he might do so, he was acting contrary to law, and such use of force was unlawful, and he would be liable therefor. With these views of the law, we regard the plaintiff's replication as a good answer to the defendant's plea, and therefore that the judgment of the court below was erroneous and the same is reversed, and the replication is adjudged sufficient.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF ADDISON,

AT THE

JANUARY TERM, 1865.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
} ASSISTANT JUDGES.

CALVIN HILL, *Administrator of* GEORGE H. EAGER, *v* TOWN OF NEW HAVEN.

Highways. Pleading. New Trial.

A party having suffered injury by the insufficiency of an highway, is not bound to establish in the outset as a distinct affirmative proposition, that he was guilty of no negligence on the occasion.

The question whether his negligence contributed to his injury is one of fact for the jury.

Where the declaration in an action for damages, under §§ 15, 16, 17, ch. 52, G. S., alleged the time of the decease of the party, which was within two years before the commencement of the action, without specifically alleging that it was within two years before the action was commenced, it was *held*, sufficient after verdict.

The power of the supreme court to grant new trials on the ground that the verdict was against the weight of evidence, should be confined to the court before which the case was tried. POLAND, Ch. J.

Hill, Adm'r v. New Haven.

ACTION ON THE CASE to recover damages for the death of the plaintiff's intestate alleged to have been caused by the insufficiency of a certain highway in the town of New Haven. Plea, the general issue, and trial by jury, June Term, 1864, PIERPOINT, J., presiding.

On trial the plaintiff asked leave to enter a non-suit on the second count in his declaration, to which the defendant objected, but the court granted the request, and a non-suit in that count was entered. The defendant then objected to the plaintiff's proceeding to trial on the remaining count, upon the ground that he could not legally do so. This objection also was overruled.

It appeared, and was not disputed, that the plaintiff's intestate, George H. Eager, while on his way from Bristol to Middlebury village, where he resided, driving a pair of horses attached to a wagon, on a highway in the town of New Haven, went with his team off from the highway into the New Haven river, and was drowned; that he left a wife and two children, one of the children having since deceased; that the plaintiff is the administrator on his estate, and that due and reasonable notice was given by the plaintiff to the defendant that the claim for damages embraced in this action would be made.

The legal duty of said town to keep said highway in repair was conceded, and the plaintiff's testimony tended to show that the highway at the place where the accident occurred was at that time out of repair, and insufficient in the following particulars: That it was at the place of the accident too narrow, and too near the margin of the river; that there were no barriers or landmark on the river side at that place, nor for a considerable distance on each side, to indicate where the road was, when covered with water, or to prevent travellers from driving off into the stream; that suitable means of discharge for the water from adjacent lands were not provided, whereby the road might be kept free from water so as to be discernable, and that loose boards that had been by this freshet forced from the fence at the place of the accident, were lying across the road, and were floating on the water in it, and calculated to frighten horses and cause them to shear off into the river.

There was evidence tending to show that one of Eager's mares that he was driving when the accident happened, was high spirited

and difficult to manage in some places; that Eager had notice from one Nash that there was probably water in the road at the point where he was afterwards drowned, and if there was it would be dangerous to go that way; that Eager and Johnson, who was with him, stopped three times after driving into the water to examine the way; that the catastrophe happened at about sunset. Other facts are stated in the course of the opinion of the court.

The defendant requested the court to charge the jury, among other things, that, upon the uncontradicted testimony in the case respecting the circumstances attending the occurrence of the accident in question, the plaintiff was not entitled to recover.

That there was no testimony in the case tending to show that the plaintiff's intestate was, on the occasion in question, in the exercise of that degree of care and prudence which was requisite to entitle the plaintiff to recover, even if the highway was out of repair and insufficient.

That if the mare of Eager was fractious and difficult to manage in places of difficulty, as stated by Eager to J. R. Nash, then the attempt to pass through the water at the time in question, was an act of imprudence and negligence in itself, such as to preclude a recovery by the plaintiff.

But the court refused so to instruct the jury, and did (among other things not excepted to) charge that the question of the care and diligence of Eager, upon the occasion of the accident, was for the jury to determine. That if the negligence, carelessness or imprudence of Eager, or his companion, contributed in any degree to occasion the accident, the plaintiff could not recover, even though the road was ever so insufficient, and the accident occurred in consequence of the insufficiency.

That if he was acting imprudently, or doing what a man of ordinary care would not have done, and thus contributed in any degree to occasion the accident, the plaintiff could not recover.

That it was for the jury to say whether it was an act of prudence or negligence on Eager's part in going there and attempting to pass. That in determining this question, the jury should look at the case just as a man would who was placed in the same circumstances that Eager was.

The jury were further told, that on the question of negligence on the part of Eager, the character of his team was to be taken into consideration, as well as the condition of the road, for it might be prudent to attempt to pass there with a perfectly gentle horse, when it would not be so with a horse which was otherwise, and if the horse was an improper one to be taken there, or was such as to render the attempt to pass unsafe, though otherwise safe, and Eager knew it, and the accident occurred on that account, the plaintiff could not recover. Verdict for the plaintiff.

After verdict and before judgment, the defendant moved in arrest of judgment for the insufficiency of the plaintiff's declaration. It was claimed that the declaration should have specifically alleged that the plaintiff's intestate died within two years before this suit was commenced, whereas it only alleged the time when the injury was received and when he died, which was within two years before the commencement of the action. This motion was overruled. To the decision of the court in allowing the plaintiff to enter a non-suit on the second count in his declaration and to proceed to trial on the other count, to the refusal to charge as requested, and the charge as given in regard to the defendant's said requests, and to the decision of the court overruling the defendant's motion in arrest, the defendant seasonably excepted.

George F. Edmunds and *E. R. Hard*, for the defendant.

I. The jury should have been instructed in conformity with the defendant's *first* and *second* requests.

It will not be denied that if Eager's negligence contributed in the least to occasion the accident by which he lost his life, the plaintiff is not entitled to recover.

And it is equally clear that the burden of showing that Eager was in the exercise of due care and prudence, or rather, that he was not guilty of imprudence, on the occasion in question, is on the plaintiff. *Barber* v. *Essex*, 27 Vt. 62; *Hyde* v. *Jamaica*, *ib.* 443; *Gahagan* v. *Boston & Lowell R. R. Co.*, 1 Allen, 187.

The question therefore is:—did the testimony on the part of the plaintiff, have any tendency to show that Eager was not guilty of negligence on that occasion? We insist that it did not; but, strongly tended to prove the contrary.

We insist that upon the testimony it was not only the right, but the plain *duty* of the court, to tell the jury that the plaintiff was not entitled to recover. 1 Hilliard on Torts, 132, 133; *Fox* v. *Glastenbury*, 29 Conn. 204; *Wilds* v. *Hud. Riv. R. R. Co.*, 2 Am. Law Reg. 76; 24 N. Y. 431 s. c.; *Gahagan* v. *Boston & Lowell R. R. Co.*, 1 Allen 187; *Lucas* v. *New Bed. & Taunton R. R. Co.*, 6 Gray, 64; *Barber* v. *Essex*, *supra*; *Foot* v. *Wiswall*, 14 Johns. 304, *per cur*; *Blyth* v. *Co. of Proprietors*, &c., 11 Exch. 781; *Strow* v. *O. & S. R. R. Co.*, 18 N. Y. 422; *Briggs* v. *Taylor*, 28 Vt. 181; *Teefer* v. *R. R. Co.*, 3 Am. Law Reg. 665.

II. The defendant's *third* request should have been complied with. If Eager's mare was "hard to manage" and "fractious in a tight place," no prudent person knowing it, would have attempted to drive her through the water at the place and on the occasion in question.

III. The statute in question gives a right of action in a case in which it did not exist at common law. It does not, as in the case of ordinary statutes of limitations, regulate *existing* rights and remedies, but the *sole* foundation of the plaintiff's right is that which the statute creates.

Now the *express condition* or qualification of the plaintiff's right to redress, is that he shall prosecute within two years. It is not a *negative* statute enacting that no action shall be maintained unless, &c., but the newly created right is qualified by requiring *affirmatively* in *the same statute that created it*, the performance of an act, without which no right is given at all.

The cases of *Mayor of Salford* v. *Ackers*, 16 M. & W. 85, and *Hall* v. *Bumstead*, 20 Pick. 2, are decisive on this question.

IV. If, upon the testimony, the court was warranted in submitting the question of Eager's negligence or prudence to the jury, the jury should have returned a verdict for the defendant, and the verdict for the plaintiff being manifestly *against the evidence*, should be set aside, and a new trial granted.

The power of this court to grant a new trial for the cause above mentioned, is unquestionable. G. S. p. 333.

J. W. Stewart and *E. J. Phelps*, for the plaintiff.

I. The ruling of the court allowing the plaintiff to enter a non-

suit on the second count, and to proceed on the others, affords no ground for a new trial.

It was purely a matter of discretion, and is not revisable here. *Squires* v. *Burgess*, 31 Vt. 466.

II. The charge of the court, relative to the alleged negligence of Eager, was in all respects correct. This is an inference of fact for the jury. *Leicester* v. *Pittsford*, 6 Vt. 247; same case, 7 Vt. 162; *Hunt & Wife* v. *Pownal*, 9 Vt. 418; *Kelsey* v. *Glover*, 15 Vt. 714; *Allen* v. *Hancock*, 16 Vt. 230; *Rice* v. *Montpelier*, 19 Vt. 470; *Cassedy* v. *Stockbridge*, 21 Vt. 391; *Willard* v. *Newbury*, 22 Vt. 458; *Sessions* v. *Newport*, 23 Vt. 10; *Morse* v. *R. & B. R. Co.*, 27 Vt. 54; *Hyde* v. *Jamaica*, *ib.* 466–469; *Vinton* v. *Schwab*, 32 Vt. 612.

The only exception to this rule is in cases where the inference to be drawn from circumstances, upon a question of this character, is so plain and clear as not to admit of discussion or rational doubt. But to come within this exception, the inference deduced must be the necessary and unavoidable result of the agreed facts. A strong case is not enough. The evidence must have no legal tendency to sustain any other inference. *Briggs* v. *Taylor*, 28 Vt. 181.

There can be no reasonable pretence for bringing the present case within the narrow exception thus indicated.

III. The petition for a new trial should be dismissed with costs.

The general rule on the subject of granting new trials for verdicts against evidence, is well settled.

They are rarely granted, and only in cases of manifest and flagrant injustice. If there is *any* evidence to sustain the verdict, it will not be disturbed. It must be *clearly* against evidence. It is not enough that the court think that the verdict is wrong. It must appear from all the evidence that it *cannot* be right. Every intendment is in its favor. And it must be clear that the jury acted from bad motives or under gross mistake. Graham & Waterman on New Trials, p. 1239, 1240, 1295, and 1283 to 1287; *Alsop* v. *Com. Ins. Co.*, 1 Sumner, 451.

A new trial on this ground should never be granted, except by the judge who tried the case, or at least with his concurrence.

IV. The motion in arrest of judgment was properly overruled. *Snow* v. *Parsons*, 28 Vt. 459.

POLAND, Ch. J. All the requests made by the defendant's counsel called upon the court to decide as matter of law, that the plaintiff was not entitled to recover against the town, because his own testimony proved that the negligence or carelessness of his intestate contributed at least, to produce the injury by which he lost his life; and it is claimed that the refusal of the court to comply with these requests, and thus take the case away from the consideration of the jury, is a sufficient allegation of error against the judgment below.

In the first place it is said, that the plaintiff at least gave no affirmative proof that Eager's conduct and management on the occasion was careful and prudent, or that he was not guilty of negligence or imprudence; and it is claimed that such affirmative proof was necessary in order to make a *prima facie* case for the plaintiff.

We do not consider this proposition strictly correct; that in this class of cases for injuries caused by insufficient highways that the plaintiff is bound to establish as a distinct affirmative point in the outset, that he was not guilty of negligence or want of care in his own conduct or management, in order to show an apparent right of recovery.

It is abundantly settled in such cases, that if the negligence or carelessness of the person injured, contributed in any material degree to the production of the injury he complains of, he cannot recover. That if the town is guilty of negligence in allowing the highway to be defective, and a party sustains an injury partly by reason of the defective highway, and partly by reason of his own negligence and omission of duty, he cannot recover.

This principle is not at all peculiar to this class of cases against towns; it applies equally to cases of collision between two travellers on a highway, or between vessels on the water; indeed it is nearly, if not entirely, universal in all cases where one party claims to have suffered a damage by the carelessness or negligence of another.

But this is a question as to the burden of proof merely; is the plaintiff bound to establish in the outset, as a distinct affirmative proposition that he was guilty of no negligence on the occasion? We think he is not. The defect in the highway being conceded or proved, the plaintiff is bound to give sufficient evidence to establish

prima facie, that he sustained an injury by reason of such defect. If the plaintiff's own evidence shows that his conduct on the occasion was careless or negligent, and that such carelessness or negligence aided or contributed to the injury he received, he establishes a defence to his action by his own evidence, as much as if the same fact were proved by the defendant. But if the plaintiff's proof discloses nothing but that his conduct at the time was proper and prudent, he is not bound to go farther, until this has been impugned by some evidence on the other side. The plaintiff in such case is bound to make out affirmatively, that his damage was caused by the defect in the highway in order to recover. Evidence which proves affirmatively that the injury was caused by the defect in the highway, must necessarily to a certain extent show negatively, that it was not caused by anything else.

To this extent, and this only can it be said, that the burden of proof is on the plaintiff in such a case, to show in the outset of his case, that his own negligence did not cause, or contribute to his injury.

The true rule on this subject was laid down by PHELPS, J., in the early case of *Lester* v. *Pittsford*, 7 Vt. 158, where he says: "It was not incumbent upon the plaintiff to negative the charge of negligence or imprudence on his part, such proof being properly matter of defence."

Nor do we understand that what is said by REDFIELD, Ch. J., in the case of *Barber* v. *Essex*, 27 Vt. 62, varies substantially from what we now hold; and in that case it is to be noticed that a specific request was made upon the court to charge, that the burden was upon the plaintiff to show that he was exercising due care at the time the accident occurred, which was not complied with, but still the judgment was affirmed.

The principle contended for, that a plaintiff should be compelled in advance to furnish evidence of the propriety of his own course of conduct, before any offer or attempt has been made to impeach it, seems quite contrary to the general rule of legal presumption which is always applied in other cases, to human conduct, that it will be presumed rightful and proper until the contrary is made to appear.

We are aware that in some modern cases of actions against rail road companies for injuries sustained by collision with the engines and cars running upon their own track, it has been decided that the plaintiff must himself show affirmatively that he was himself guilty of no negligence whereby the collision was produced; such are the cases of *Gahagan* v. *B. & L. R. R. Co.*, 1 Allen 187, and *Telfer* v. *Northern R. R. Co.*, in N. J. 3 Am. Law Reg. 665.

It is manifest that there may be reasons for applying a different rule to this class of cases, from the fact that the cars and engines of the road run upon a fixed and permanent track that cannot be deviated from, and from the peculiarly dangerous and uncontrollable power by which they are operated, so that a person who has placed himself within their range and power might properly be called upon to explain by his evidence how he came there before receiving damages for his injury. Whether in such cases a rule of evidence shall be adopted varying from that in general use between ordinary parties, we have no occasion to decide; it is enough for this case to say that we see no ground for its adoption in cases like the present, and the long and uniform course of trials of such actions in this state has shown no necessity for it.

But if the plaintiff was bound to show affirmatively that the conduct of his intestate on the occasion was that of a careful and prudent man, we do not well see how the court could properly be called upon to decide whether he had proved it, and this is substantially the same question presented by one of the defendant's requests, which was in substance that the court should decide that the plaintiff's evidence proved negligence and carelessness on the part of his intestate.

The court below were clearly right in refusing to treat the question as one of law for them to decide, when it had so repeatedly and uniformly been decided that in these cases, whether the plaintiff was so in fault that he had contributed to his own injury and could not recover, was a question of fact to be submitted to, and decided by the jury.

Whether it was an act of common prudence for the plaintiff's intestate to attempt to drive over this road at all, and whether in making the attempt he managed in a prudent manner, or in the best

manner, depended upon a great variety of facts and circumstances. It is not claimed that the law has established any rule of conduct in such cases, except the general one that the party shall conduct like a prudent and reasonable man. Now the question of prudent and reasonable conduct, in a case depending upon a variety of considerations, facts and circumstances, is one peculiarly for the consideration of a jury, depending upon experience, judgment and discretion for its decision. It is much like the question whether a highway is sufficient or not; if the evidence as to its actual condition be entirely undisputed, the court will not undertake to decide as matter of law, whether it is sufficient or not, because it is wholly a question of judgment and experience, and is dependent on many considerations, as to the amount and kind of travel to go over it, the natural safety or danger of the place, &c. Many attempts have been made to turn the question into one of law for the court to decide, but they have been uniformly unsuccessful. See *Sessions* v. *Newport*, 23 Vt. 9; *Cassedy* v. *Stockbridge*, 21 Vt. 391.

In *Sessions* v. *Newport*, the court say "in all questions depending upon a general inference from a multiplicity of particular facts, the inference is always one of fact, unless the law has fixed some established rule. But in all cases of doubt of this character, and where the law has fixed no rule, the inference is one to be made by the jury, such are questions of due diligence, skill, reasonable time, probable cause, intention, &c."

This very point, and in a case of the same character as this, is very clearly elucidated by ELLSWORTH, J., in *Williams* v. *Town of Clinton*, 28 Conn. 266.

The only case in this state to our knowledge where the court have taken it upon them to decide that a particular course of conduct was or was not according to the requirements of common prudence, is the case of *Briggs* v. *Taylor*, 28 Vt. 180. In that case the court decided that it was not exercising proper care, for an attaching officer to leave carriages and wagons standing in an open field through the winter, and that it was error in the court to leave it to the jury to say whether it was reasonable and prudent. The court held that this was a case where by the common and universal experience of all men, such property must be exposed to and injured by the storms of

winter, and by the common and inevitable course of nature such must be the result, and could not be otherwise, and that no reasonable man could expect or believe otherwise.

In a simple case involving no combination of facts, and where by the fixed course of nature, like the law of the seasons, there could be but one result and one opinion, we see no reason to question the propriety of this decision, but it affords no ground for the defendant to stand upon in the present case.

The defendant's third request was properly refused for the same reason. It was an attempt to turn the case from one of fact for the jury, into one of law for the court, by adding another fact, when all were questions of fact, and not of law. If the case was one proper to be submitted to the jury at all, no question is made but that the instructions given were proper, and all the case required.

The motion in arrest was properly overruled.

The statute giving an action in cases like the present, to the representative of the person whose death has been caused by the wrongful act, neglect or default of another, provides that such action shall be commenced within two years after the decease of such person.

The declaration in this case states the time when the injury was received and the death of the plaintiff's intestate occurred, and this time is within two years before the commencement of the action, but it is not specifically alleged that it was within two years.

The argument of the defendant is, that the plaintiff in his proof would not be bound by the day alleged in the declaration, and that he might prove it to have been more than two years before the commencement of the suit, and thus entitle himself to recover contrary to the provisions of the statute.

If this provision of the statute is to be regarded the same as the ordinary statute of limitations, which must be specially pleaded in order to entitle a party to avail himself of it, there would be considerable force in the objection. But we do not regard it as having precisely that character, but as an absolute bar not removable by any of the ordinary exceptions or answers to the statute of limitations. So if upon the declaration it appeared that the death happened more than two years before the commencement of the action, the declaration

would be bad upon demurrer, and the plaintiff could not answer that he was not bound by the day, and might on trial prove it to be within two years, nor would the defendant in such case be compelled to plead the statute. And so if it be alleged within two years, and on trial is proved to be more than two years before the commencement of the action, the defendant would be entitled to a verdict for that reason.

Whether this declaration would have been sufficient on demurrer, we are not called upon to decide, but after verdict we have no hesitation in upholding it, both upon the ground of the allegation of time being sufficient, and also that it was a necessary fact to be proved on the trial in order to enable the plaintiff to recover, and after verdict it would be presumed to have been proved, if the time had not been alleged at all.

It only remains to consider the question presented under the petition for a new trial. This is based upon the alleged ground that the verdict was contrary to, and unsupported by the evidence. It was decided by this court at the last general term, in the case of *Northfield Bank* v. *Brown*, that under our present statute, this court have the power to grant new trials for the cause alleged in this petition, but it was said in that case "the court will not set aside a verdict as being against the weight of evidence, except when it is clear that the verdict is wrong, and not warranted by any fair construction of the evidence, and when there is no room for difference of opinion in fair judgment as to which way the verdict should be. If there is any conflict of evidence, and any reasonable ground for doubt on the evidence which way the fact is, the verdict is conclusive." These observations as applied to the exercise of the power of this court to grant new trials for such cause we think are none too strong; indeed in our judgment the power to grant new trials for this cause should be confined to the court before which the case is tried, who saw the witnesses, and heard them testify, and not be entrusted at all to another tribunal, who have only a meagre outline of the case afforded by the judge's notes of the evidence taken at the trial.

The strong ground of the defendant, as to the negligence of Eager, is, that he ought not to have attempted to pass over the road

at all, in the condition it was, covered with water, and running along by the margin of a swollen stream; that it was rash and fool-hardy to make the attempt, and was itself negligence, or worse. It does not appear that the depth of water upon the road was such as of itself to have made the attempt to pass very dangerous; it was about up to a horse's body in the deepest place, and only about up to a horse's knees at the place of the accident. Nor does it appear that the current of water over the road was such as to incur any danger of the team being swept off by it into the river. The great danger, if there was great danger, was in their not being able to distinguish the track of the road and keep upon it, covered as it was with water. The ability to do this would depend very much upon the degree of familiarity and acquaintance Eager had with the road, and the objects visible in the vicinity of the road. It seems he lived in the vicinity, and may fairly be assumed to have been well acquainted with the road, and to be able to judge by appearances as to the depth of water upon it, and he had passed over the road once on that same day.

But there does not seem to have been any inability to keep upon the road, or that he departed from the ordinary path at all, until he came to the boards one end of which had been detached from the fence and swung across the road upon the water, and he had already passed the deepest water and come to where the water was comparatively shallow. These boards across the road were undoubtedly the real cause of the disaster, and but for them Eager would have passed through safely. These boards lying on the surface and reaching nearly to the bank of the river prevented the team from passing, and being swayed and agitated by the water doubtless irritated and frightened the horses, and made them to some extent less manageable.

It does not appear that the condition of these boards was known to Eager when he entered upon the road, or that he had any reason to suppose that he should meet any such obstruction to his passage. Nor does it appear that these boards could have been, or were seen by him until he approached them.

We are therefore unable to say that it was unreasonable and imprudent to attempt to pass over the road under the circumstances, or

to say that the jury were wrong in finding that it was prudent and reasonable.

It was conceded that Eager was usually a competent and skilful manager and driver of horses, but the defendant claimed that on this occasion he had drank ardent spirits to such an extent as to disqualify him to exercise his usual skill.

We cannot say from the evidence that Eager was at all deprived of his ability to drive with skill and judgment, by the use of spirits. It was claimed that one of the horses driven on the occasion was irritable and fractious, and that it was imprudent to attempt to drive such a horse through the water, even if a steadier and milder tempered one might have been driven with safety.

We cannot say from the evidence that Eager's mare was anything but a high spirited, ambitious, active animal, nor that in the hands of a skilful driver accustomed to drive and manage her, it was not as safe to drive her over this road as one of less spirit and activity.

Upon the whole case, we think the questions upon which its proper decision rested, were eminently proper to be submitted to the determination of the jury; that they were properly and carefully submitted to them; and we are unable to say they were not rightly decided.

The judgment is affirmed, and the petition for new trial dismissed with costs.

JOHN MONTGOMERY *v.* JOHN A. VINTON.

County Court. Practice.

All applications for relief against *defaults* or *nonsuits* in the county court must be made in the county court which ordered them.

PETITION to the supreme court for a new trial. The plaintiff was *non-suited* in the county court, and prayed for a new trial on the ground of having been deprived of his day in court by unavoidable accident.

———, for the petitioner.

J. W. Stewart, for the petitionee.

POLAND, Ch. J. The petitioner has mistaken the tribunal to which his application should have been made. This court has no jurisdiction to grant new trials in cases in the county court, except cases which have been *tried* in the county court.

All applications for relief against *defaults* or *non-suits* in the county court, must be made in the county court which ordered them. This has been long and repeatedly settled by decisions of this court. *Scott* v. *Stewart*, 5 Vt. 57; *Adams* v. *Howard*, 14 Vt. 560; *Beckwith* v. *Middlesex*, 20 Vt. 593; *Foster* v. *Austin*, 33 Vt. 615.

Petition dismissed with costs.

ORIN ORCUTT *v.* THE ESTATE OF COLES R. COOK.

Husband and Wife. Married Women. Evidence. Agency.

Where the work which the wife does, or the business she carries on, gives notice to all, by its very character and nature, that she is authorized by her husband to carry it on, and is the party to deal with, the case comes within the statute of 1858, (G. S., p. 327, §27,) which provides that married women may testify for or against their husbands in certain cases.

The hiring out of a minor son to labor is not a business of such character; and in the absence of all proof of authority to the wife to make the contract, or of ratification of it, by the husband, the wife was held to be an incompetent witness.

The effect of ratification alone not decided.

THIS was a claim for services of a minor son rendered to Coles R. Cook during his lifetime.

The case was referred, and the referee reported that the first witness introduced by the plaintiff was Almira Orcutt, the wife of the plaintiff. She was objected to on the part of the defendant, on the ground that she was not such an agent of her husband as was contemplated by the act of 1858, and therefore could not be admitted as a witness. The plaintiff's counsel contended that she was a competent witness, and could be admitted under the rulings of the courts. It was decided to admit her testimony with the understanding that it should, together with the objections, be reported to the court. It appeared from the testimony of the witness that Coles R. Cook came

to the house of the plaintiff, and the witness bargained with him that her son William W. Orcutt, then twelve years of age, should go and live with him until he was of age, at a certain price agreed upon. After the boy had lived with Cook about three years, Mrs. Cook, the wife of Coles R. Cook, died.

Mr. Cook married again in the fall of 1856. The boy, William, stayed with Cook until spring, and then came home and said he was not satisfied; witness told the boy he must go back, and witness went with him. Mr. Cook said he was glad he came back, and he would make a new bargain with him; said he would give him a colt worth $50. if he stayed until he was twenty-one, and $100. in money; and if he stayed only through the summer, he would do what was right about it. Mr. Cook brought the boy, William, home the last week in November, and said he had got to bring the boy home or carry the woman off; said he was a good boy and he would get him some clothes; he afterwards brought him some cloth for a pair of pants and a coat; Cook said he would do what was right about his wages. It appeared also from the testimony of the witness that the plaintiff, Orin Orcutt, the husband of the witness, was about home at the time said bargains were made.

The evidence of a new bargain rests almost entirely with the testimony of Mrs. Orcutt, the wife of the plaintiff, and if the court are of the opinion that her testimony is inadmissible, there would be no new bargain whereby the plaintiff could claim any pay for the services of his son, unless he continued to live with Cook until he was of age, and therefore the referee finds for the defendant his costs. But if the testimony of Mrs. Orcutt is admissible, and a new bargain was made when her son returned to live with Mr. Cook, on or about the first of April, 1857, then the referee finds there will be due the plaintiff for the labor of his son the sum of forty-seven dollars, with interest to be added from the 1st day of December, 1857.

The court decided upon the report of the referee, at the December Term, 1862, PIERPOINT, J., presiding, that the wife of the plaintiff was his agent, and that her testimony was properly admitted, and rendered judgment for the plaintiff in the sum reported,—to which the defendant excepted.

Eldridge and *Fisher*, for the defendant.

Horatio Needham, for the plaintiff, cited to the point of the existence of an agency between the plaintiff and wife,—2 Stark. Ev. 33; *Cairnes* v. *Bleecker*, 12 Johns. 300; *Briden* v. *Dubarry*, 14 Serg. & Rawle, 27; *Amory* v. *Hamilton*, 17 Mass. 103.

ALDIS, J. The statute of 1858 enables married women to testify for and against their husbands in certain cases, viz: 1st, in actions on policies of insurance of property, so far as relates to the amount and value of the property injured; 2d, in actions against carriers, so far as relates to the loss of property and the amount and value thereof; 3d, in all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of the husband.

The three classes of cases show the intent of the legislature to admit the testimony of the wife where from the nature of the case the wife would have a better knowledge of the matter than the husband, and where not unfrequently the husband would have no knowledge and no means of proof or redress without her testimony.

Thus the wife has the better and in some respects the exclusive knowledge of household articles of furniture, clothing, &c., destroyed by the burning of a dwelling house. So of the contents of her trunks lost in travelling.

The third class—business transactions conducted by the wife as the agent of her husband—must by reasonable construction include those matters of business *expressly* confided to her agency; those which are usually entrusted to the wife alone to manage for the husband; and all those kinds of business which the wife carries on as the chief superintendent and manager. Thus where the wife is usually entrusted with the purchase of provisions and clothing for the family—meats from the butcher, flour, sugar, &c., from the grocer, clothing for the children, &c., it is obvious that her knowledge of such transactions must to a great extent be all the evidence the husband can have, and comes therefore within the intent of the act. So where a wife carries on business as the head manager thereof,—as dress-maker, milliner, school-teacher; or where her labor is the meritorious cause that earns the money, as by washing, sewing, &c.; then the reason of the rule would seem equally to apply. In all such cases he who deals with the wife treats her as the principal in

the transaction, does not deem it necessary to inform the husband of the bargain or ask his consent to it, but considers that the wife represents the husband. From the husband's course of conduct in the particular kind of business, or from the usual course and custom of people generally in such matters, the person so dealing with the wife has the right to consider that she is, *pro hac vice*, the agent of the husband, and what she agrees to will bind him. Hence in such business what she knows she ought to be allowed to testify to.

The difficulty is to draw the line. Some women are entrusted by their husbands with the making of bargains and the transactions of business to a much greater extent than others. Where a special, direct and express authority is given to the wife, is exercised by her, and he who deals with her acts upon the same basis, then there is no reason why she should be excluded. She is made the express agent of the husband. Nor would it seem to be within the letter or spirit of the law that the wife should be excluded because she advises with her husband on the subject and he in fact has a knowledge of the trade that his wife is making for him. The statute does not confine the admissibility of her testimony to cases where her husband is absent, or where from necessity she has to act as his agent. It includes all business transactions had and conducted by her as the agent of her husband. The words of the statute are general, to protect the husband's interests by enabling him to use his wife's evidence in cases when she in fact acts for him, and the person who deals with her knows, or must reasonably and fairly understand, that he is dealing with her as agent of her husband. Where the authority is express to the wife and the other party knows it, it is plainly within the statute.

Where by the usual practice of the country the wife acts in such matters for the husband, the person dealing with the wife is supposed to know such general custom and to act upon it. But in such case the custom must be a common, general, well-known custom—like other customs which people are bound to take notice of.

Where the work she does, or the business she carries on, gives notice to all, by its very character and nature, that she is authorized by her husband to carry it on, and is the party to deal with, it is within this statute.

In the case at bar the husband and wife were living together—the husband was at home at the time the deceased, Cook, came to hire his son. The hiring out of a son to labor is not a business usually entrusted to the wife by the husband. There is no such custom. Usually the husband (though he may advise with the wife) makes the bargain himself. Hence the wife derives no authority from custom. No express authority is shown. The husband did not say to Cook, "Trade with my wife, and whatever she agrees to I will abide by." On the contrary it would seem that he could not have known of the new bargain, or that it was contemplated, till after it was made. Cook first suggested it to the wife when she brought the boy back to continue under the first agreement. The nature of the business confers no special right, no power generally understood and acted on, enabling the wife to represent the husband. If it had been a daughter whom the mother had hired out to service, it might perhaps have been more doubtful; though as to that we need express no opinion.

It stands upon this point—the wife did in fact make the new bargain, assuming to act for her husband, and without consulting him. Cook made the bargain with her alone. There is no proof of any authority given her by her husband to make the bargain. It is clear that he might have refused to be bound by it when it came to his knowledge. He could be bound by it only by a subsequent ratification of it.

1. The first question that arises therefore is this: The wife, having no authority as agent of her husband, acts *as* his agent; and the other party deals with her alone and as his agent; if the husband subsequently ratify the act of his wife, is she admissible as a witness in a suit brought by the husband on the contract? Upon this point a part of the court think that to make her a witness by the statute it is necessary not only that the transaction must be had with and conducted by her as the agent of her husband, but that she must, *in fact, at the time*, be his agent. But upon this point there is no such concurrence of opinion as to enable us to express an opinion.

2. But we concur in the opinion, that there is nothing to show any knowledge of the new bargain, or any ratification of it by the husband, till long after the controversy arose. The boy's staying

with Cook with his father's knowledge might as well have been under the original contract as the new one, and that is all that can be claimed to show ratification.

As the case stands, the proof of agency is wholly wanting as to the new contract. It is true that the bill of exceptions states that the court found she was the agent of her husband. But we see no evidence as to the new contract tending to show that.

As the plaintiff can only recover (if at all) on the new contract, and as to that we find no proof of agency, the judgment must be reversed, and judgment rendered for the defendant for his costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF RUTLAND,

AT THE

JANUARY TERM, 1865.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

TILLY B. NORTON *v.* TINMOUTH SCHOOL DISTRICT NO. 7.

School District. Prudential Committee. Custom.

It had been the custom of a school district to apportion the wood for the school to the scholars, and to sell the right of furnishing the deficiency, if any, to the lowest bidder. *Held*, that this custom was not binding upon the prudential committee, and that he might furnish the deficiency himself and charge the price to the district.

But having furnished the wood, he would have no right to assess the amount upon the scholars, or the district, without a vote of the district authorizing him to do so.

Norton v. School District.

Held, that the prudential committee might compromise and pay a claim for a couple of blackboards which the plaintiff had allowed the district to use until one of them was worn out.

ASSUMPSIT in the common counts. The action was referred to a referee who found and reported that the plaintiff was the sole prudential committee of the defendant school district for the years 1855 and 1856; that as such committee he furnished for the use of the school in the years 1855 and 1856, in addition to the items not questioned, two cords of wood each year for which he charged $8. In the year 1858 he made a claim of $4. on the district for two blackboards, all of which the referee allowed, subject to the opinion of the court upon the following statement of facts:

It had for many years been the custom of the district to assess the wood necessary for the use of its school upon the scholars, to be delivered ready for inspection by the wood inspector before the first day of December of each year. The privilege of supplying any deficiency in such assessment was annually sold to the lowest bidder. It became the duty of the prudential committee according to said custom on the first of December, or immediately thereafter, to furnish the said bidder with a bill of such deficiency, which was to be supplied in the said month of December, and in the tax bill assess the amount of such deficiency to the individuals so deficient. It did not appear that the plaintiff gave to the bidder of deficient wood any notice or bill of such deficiency during either of those years in which he was the committee as was required of him by said usage, nor that the wood which he furnished was inspected, nor that he caused the wood so furnished to be assessed in the rate or tax bill against the delinquents.

The blackboards charged had been used by the district for many years until one was worn out, but the other was still in use. The plaintiff in the year 1858 compromised the claim with the then prudential committee at $4. as above allowed.

On the hearing on said report at the September Term, 1864, KELLOGG, J., presiding, the court decided that the plaintiff was entitled to recover of the defendant the sum reported by the referee, and his costs, and rendered judgment accordingly. To this decision and judgment the defendant excepted.

E. Ross and *D. E. Nicholson*, for the defendant.

B. Frisbie and *Dewey & Joyce*, for the plaintiff.

PIERPOINT, J. It is by law made the duty of the prudential committee of every school district, "to see that fuel and furniture, and all appendages and things necessary for the advantage of the school, be provided." No question is made in this case but that all the articles furnished to the district, and for which this suit is brought, were such as the plaintiff, as prudential committee, was by the statute required to furnish, and were necessary at the time they were furnished.

But it is said he cannot recover for the wood, because it was not furnished in the way that the district had been in the habit for many years of having the wood furnished. The statute provides that school districts may, at a meeting legally warned for that purpose, vote to defray the expense of fuel by apportioning the same to the scholars. It does not appear that this district had ever taken any vote upon the subject, but their custom had been, to apportion the wood itself to the scholars, and if sufficient was not procured in that way, to sell the right of furnishing the deficiency to the lowest bidder. This custom we think was not binding upon the prudential committee, as a vote might have been, but he had the right if he thought best, to adopt a different course, and it appears that during the two winters when he was the committee, on finding there was a deficiency of two cords of wood each winter, he furnished it himself and charged the price of it to the district. This he might well do, especially as it does not appear that he charged any more for it than it would have cost if he had procured it of any one else. Having furnished the wood he had no right to assess the amount upon the scholars or the district without a vote of the district authorizing him to do so.

As to the claim of four dollars for two blackboards, it appears that the plaintiff was the owner of the blackboards, and had allowed the district to use them for many years, until one of them was worn out. He made a claim upon the district for them, which was not paid, until finally the prudential committee compromised the matter with him, and agreed to pay him four dollars and take the remaining board. This we think it was competent for the prudential commit-

tee, as the general financial agent of the district, to do, and that the claim was properly allowed by the referee.

The right of the plaintiff to recover for the other items of his account is not seriously questioned.

Judgment of the county court is affirmed.

THOMAS HITT *v.* VOLNEY P. SLOCUM.

Receipts. Evidence.

Receipts not under seal are always open to explanation and even to contradiction by parol evidence. They are not contracts, so as to be the exclusive evidence of the intention of the parties.

Dictum, Evidence is inadmissible to impeach the general character of a party as a book-keeper.

BOOK ACCOUNT. The auditor reported and found that there was nothing due from either party to the other to balance book accounts between them, and found for the defendant to recover his cost.

The auditor further reported that on the trial of this case the plaintiff was sworn as a witness and testified to the correctness of the accounts upon his books produced and claimed to be his original books.

The defendant offered evidence to impeach the general character of the plaintiff as a book-keeper, and proposed to ask of witnesses the following question, viz: "What is the character of the plaintiff in the community where you reside, for fairness and correctness as a book-keeper?" To this question the plaintiff objected, but the objection was overruled and the defendant was allowed to ask the question. In reply to the question several witnesses gave evidence tending to show that the general character of the plaintiff for correctness as a book-keeper "was not upon a par."

The auditor further reported that the defendant in this case commenced a suit at Granville in the State of New York, before a justice of the peace, in which he declared upon a note for twenty-five

dollars, payable to Geo. Osborn, and also upon "an account for goods, wares and merchandise sold and delivered, and for labor and services, board and lodging, money paid out and expended, money lent, and for commission in buying property." That the defendant (Hitt) appeared and put in his answer in writing containing a general denial and notice of set-off, work and labor, goods, wares and merchandise delivered, cash lent and advanced, account against a hired girl which it was alleged that the plaintiff (in that suit) had agreed to pay, and for damages done to a certain grey horse by using him unkindly and unskilfully. And that each party claimed that there was a balance due to him from the other party, on their general account and dealings.

When the parties met for trial negotiations for a settlement were set on foot, which resulted in an agreement that all the matters in controversy between the parties should be settled except the claim of Hitt for damages to the horse, and that Slocum should stipulate in writing to take no advantage of the statute of limitations upon said claim; the Osborn note to be given up, and each party to pay his own costs.

Slocum thereupon gave up the Osborn note, and signed an agreement in writing not to take advantage of the statute of limitations upon said claim for damages to the horse, which agreement was delivered to Hitt. And Hitt gave to Slocum a receipt for the Osborn note, to apply on account. No other papers were passed between the parties, or were delivered by either party to the other at the time, and no entries were made at the time by either of the parties upon their books, but Hitt subsequently credited Slocum with the amount of the Osborn note given up.

The plaintiff (in this case) insisted that as matter of law the receipt above described was conclusive evidence that the accounts of the parties were not settled or intended to be settled, and that the auditor could not legally find a settlement upon oral testimony in opposition to the receipt, but the auditor decided otherwise, and found the fact of a settlement upon the testimony of persons who were present and heard or took part in the negotiations for the same. The plaintiff excepted to the report.

On the hearing upon the auditor's report, at the September Term,

1864, KELLOGG, J., presiding, the court decided that the plaintiff's exceptions should be overruled, and that the defendant was entitled to a judgment in his favor on the report, and rendered judgment accordingly. To this decision and judgment the plaintiff excepted.

Fayette Potter and *J. B. Beaman*, for the plaintiff.

J. B. Bromley and *R. C. Betts*, for the defendant.

ALDIS, J. 1. The receipt did not purport to be a written statement of the agreement of the parties as to the settlement. It was only an acknowledgment of the receipt of the Osborn note to apply on account. Standing alone it would not tend to show a settlement, but the contrary, and as evidence tending to disprove a settlement it was admissible for the plaintiff. But receipts not under seal are always open to explanation, and even to contradiction, by parol evidence. They are not contracts, so as to be the exclusive evidence of the intention of the parties. *Nye* v. *Kellam*, 18 Vt. 594; *McDaniels* v. *Lapham et al.*, 21 Vt. 222; *Sparhawk* v. *Adm'r of Buell et al.*, 9 Vt. 41; *Burnap* v. *Partridge*, 3 Vt. 144; *Hutchins et al.* v. *Olcutt*, 4 Vt. 549.

The case shows that the agreement of the parties in regard to a settlement, if there was any, was not reduced to writing. It was clearly proper therefore to receive parol proof to show a settlement.

2. It is said the auditor should have reported the facts in regard to the settlement, or the evidence of it.

It would have been improper for the auditor to have reported the evidence. His report should state only the facts which he finds from the evidence.

He does find and sets forth the settlement, and states it so fully as to show that it included the matters for which the plaintiff now sues.

3. It is further urged by the plaintiff, that the question put to the witnesses on the trial, viz: "What is the character of the plaintiff in the community where you reside for fairness and correctness as a book-keeper", was improper.

The credit of account books depends upon their being a daily record of the business transactions of the party who produces them—of

the entries being made cotemporaneously with the transaction of the business—of their appearing to be kept so that the entries are made in the order of time, without blanks or spaces being left in which false charges might be written,—in being honestly and fairly kept, free from erasures, alterations or other signs of fraudulent practice. A dishonest man may keep fair books, upon the face of which everything appears honest and correct, and yet continually insert false charges. How shall this be made to appear? Ordinarily no one can be supposed to know this but the person who has been defrauded by such practices,—who has seen the books, the false charges, and knows that they are false. The public generally would know nothing about it and have no means of knowledge. The honesty and accuracy of a man's account books do not lie open to the world like his character for truth. That appears constantly before men—is tested by daily intercourse and conversations with his neighbors, and hence his reputation among his neighbors in this respect is admitted as evidence of what his real character is.

But to extend this rule of law to a man's reputation for keeping honest and correct books of account would be going farther than the reason of the rule, or any correct practice in the courts would justify.

No authorities have been cited to sustain the admission of such evidence; nor are we aware that there has been any practice to support it.

The consideration of this point is not necessary to the decision of the case, as the fact of settlement defeats the action. But as the point was argued on the hearing we have thought it proper to make these intimations in regard to it.

Judgment affirmed.

TOWN OF SHERBURNE *v.* TOWN OF HARTLAND, *Appellant.*

Pauper.

The pauper act of 1801 *held* to apply to minor children after marriage, though not before, on the ground that marriage emancipates the minor.

THIS was an appeal in behalf of the town of Hartland from an order for the removal of one Ezekiel West, and Louisa, his wife, as paupers, from the town of Sherburne to the said town of Hartland. The cause was referred to a referee, and on the hearing on his report at the September Term, 1864, KELLOGG, J., presiding, the court, *pro forma*, decided that the said Ezekiel West and Louisa, his wife, were unduly removed, and rendered judgment in favor of the town of Hartland, the appellant, on said report. To this decision and judgment the town of Sherburne, the appellee, excepted.

The facts found by the referee are stated in the opinion.

Dewey & Joyce, for the plaintiff.

John Colby and *Washburn & Marsh*, for the defendant.

ALDIS, J. The pauper act of 1801 was in force till 1817. It enacted—"that all and every person coming into and residing within any town in this state, who shall not be warned" to remove out of town "within one year after he or she removed into such town, shall be deemed to have a legal settlement in such town."

Ezekiel West, the pauper in this case, moved into Sharon in 1794, when he was five years old, and resided there till 1808. He was an illegitimate child,—and, when he was five years old, he was removed from his mother in Hartland to live with his uncle in Sharon. At the age of eighteen (in 1807) he was married in Sharon, and continued to reside there one full year after his marriage. He was not warned out of Sharon.

Did he thereby acquire a settlement in Sharon? The words of the act—"all and every person"—would literally include minor children. But it was decided in *Wells* v. *West Haven*, 5 Vt. 326, that the statute did not apply to minor children living with their parents, or guardian, or under the care of a friend. Such young persons not being at liberty to act for themselves could not remove from the town if ordered;—nor was it contemplated that they should be separated from their families. West therefore while in the family of his uncle

and under his care and control was not subject to the warning out process. The same decisions have been made in New Hampshire and Massachusetts under similar statutes. 1 N. H. 264; 3 N. H. 472; 12 Mass. 430.

2. But it is said on behalf of the defendant that he married at the age of eighteen and was thereby emancipated and left to act for himself; that he thereby became liable to be warned out, and that he thereafter resided in Sharon a year without being warned to remove.

Emancipation under the pauper law exists, when the minor contracts a new relation inconsistent with being a part of the family. This is the definition approved by Judge Williams in *Wells* v. *West Haven*, 5 Vt. 326. A mere residence with another separate from the family of the parents is not emancipation. 3 T. R. 353; 3 N. H. 472; 5 M. & S. 214; 5 B. & A. 523; *Bradford* v. *Lunenburgh*, 5 Vt. 481. In this case the subject of emancipation was well considered, and it was held that the minor's living separate from his mother from the age of sixteen till he was twenty-one did not emancipate him. Judge HUTCHINSON dissented upon the ground that the separate residence under the facts of that case constituted emancipation.

But all the authorities agree that marriage emancipates the child. It is a new relation inconsistent with subjection to the control and care of the parent. The husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be the master of himself, his time, his labor, earnings and conduct. He can no longer be subject to the control of his parents.

All the authorities seem to concur in this doctrine. *Bradford* v. *Lunenburgh*, 5 Vt. 481; 4 Conn. 373.

When emancipated he has the control of himself, is not subject to the restraint of his parents, can remove himself out of town, and the warning to remove should then be given to him rather than his parents.

The contracting the relation of marriage is generally a matter of notoriety in a town, and one of which the town authorities should take notice. In fact they would be quite as likely to know it as to

know when a minor comes of age; or is emancipated by agreement of the parents.

It is urged that the minor during the year of marriage might still have lived with his uncle and not have been emancipated. Without determining what would be the effect of such continued residence in the uncle's family, it is sufficient to say that nothing of that kind appears to have been proved, and the fair and *prima facie* presumption is to the contrary.

Judgment affirmed.

W. H. SMITH *v.* JOSEPH DOUGHERTY.

Book Account. Attorney Fees.

A retainer to defend a suit does not extend to the employment of the attorney to defend a second suit brought upon the recognizance entered in the first suit.

The attorney was the party to recognize in the first suit, and, being sued upon the recognizance with his principal the defendant in this suit, entered to defend and made a tender without the defendant's express directions but with his knowledge. This tender constituted the only defence. *Held*, that knowledge of the attorney's appearance and defence by the defendant did not imply an assent to the employment of the attorney and make the defendant liable therefor.

BOOK ACCOUNT. The auditor reported that the items in the plaintiff's account were admitted to be correct by the defendant, with the exception of items numbered 29, 30, 31, 32, 33 and 34, in relation to which he found that Dr. H. D. Allen brought a suit in his favor and made returnable before a justice of the peace against the defendant, and that the defendant retained the plaintiff to defend it; that a trial was had and a judgment recovered for the plaintiff therein; that thereupon the defendant appealed, the plaintiff entering as bail for said appeal, and that said suit, at the March Term, A. D. 1860, of the Rutland County Court was duly entered and became pending therein; that the plaintiff (Allen) recovered a judgment in his favor, but for what amount did not appear; that after-

wards the said Allen commenced a suit in his favor, against the plaintiff and defendant in this action, counting and declaring upon their recognizance entered into before the justice on said appeal, which action is still pending in the county court. All the items from No. 29 to 34 inclusive, were for fees charged at reasonable rates by the plaintiff in said suit against the parties in this suit, and which was instituted by Allen as above stated upon said appeal recognizance. Soon after the commencement of said suit the plaintiff tendered Allen on account of his claim the sum of $18.84. Said tender was not accepted by Allen, but for what reason did not appear, nor did it appear whether it was sufficient in amount or not; nor did it appear that said tender was made at the express request of the defendant though he knew the plaintiff appeared therein, nor that the plaintiff was expressly requested or employed by the defendant to defend said suit, but the plaintiff acting under his employment by the defendant to defend the first mentioned suit, and entering bail therein for the appeal referred to, at the request of the defendant, appeared in said cause, and made the tender and charged therefor as above stated. Said tender has been kept good, and the question as to whether it was sufficient or not, is the question in dispute in the pending suit against the plaintiff and defendant.

The cause was heard upon the auditor's report at the September Term, 1864, KELLOGG, J., presiding, and the court decided that the plaintiff was entitled to recover for all the items of his account as reported by the auditor, and rendered judgment accordingly,—to which the defendant excepted.

Chauncy K. Williams, for the defendant.

The plaintiff is not entitled to recover of the defendant the amount charged in these items, because there is no express or implied promise from Dougherty to pay him.

Smith's employment in the former suit conferred on him no authority to appear for Dougherty in the second suit. His authority continued only until final judgment was perfected in the first suit and no longer. *Walradt* v. *Maynard*, 3 Barb. 584, *cited* in 1 Abbott's N. Y. Digest, 336, § 132.

Neither had Smith as co-defendant any authority to employ himself for Dougherty. *Paddock* v. *Colby et al.*, 18 Vt. 485; *Smith* v.

Lyford, 24 Maine, 147; *Weston* v. *Davis*, 374, *cited* in Eastman's Digest, 86; *Cook* v. *Riter*, 4 E. D. Smith, 253, *cited* in Abbott's N. Y. Digest, p. 335, § 119.

W. H. Smith, *pro se*, maintained that the plaintiff's items Nos. 29 to 34 should be allowed.

1. Because the plaintiff was *expressly* employed by the defendant in his litigation with Allen. The *scire facias* was but a branch of the original litigation, and the plaintiff might well continue his defence in that.

2. Because the defendant *knew* he *was sued* in the *scire facias*, knew that the plaintiff was defending him in that action.

3. It was the defendant's *duty* to *defend his bail*. And bail may *reasonably* defend himself and hold his principal liable for expenses, upon an implied agreement of principal to indemnify and defend his surety and bail.

ALDIS, J. This is an action on book. To recover for the services charged the plaintiff must show that he was employed by the defendant to defend the suit. It is not enough for the plaintiff to show that the defendant may be liable, by virtue of his obligation to him as his surety, to pay him whatever damages and costs he may necessarily incur in the defence of the suit on the recognizance. That liability for these expenses and services if it exist at all rests upon Dougherty by reason of his duty to indemnify the plaintiff as his surety; but does not authorize the plaintiff to charge the damages and costs he may so have to pay on book.

1. We do not think the suit on the recognizance is a branch of the first suit in such a sense that a retainer to defend the first suit extends to an employment to defend the second. Dougherty might think he had a good defence to the first suit; but, that failing, know he could not defend the suit on the recognizance and therefore not wish to answer to it.

2. Dougherty knew that Smith did appear in the second suit to defend it. Now if that defence was for Dougherty's benefit, then knowledge that he was so defending it and making no objection, would imply that he assented to such employment of Smith and make him liable therefor. But if Smith in defending the suit was engaged in a defence for his own benefit and not for Dougherty, then

knowledge of that fact and not objecting, would not make Dougherty liable.

Hence we must examine to see what the nature of the defence to the second suit is. It is a tender by Smith, made soon after the suit was brought and which he claims is sufficient, and which Allen says is not sufficient. When the bill of exceptions says—"the question, as to whether this tender is sufficient or not, is the question in dispute in the pending suit,"—we construe it to mean that that is the only defence made by Smith. None other appears, and if there were any other it should have appeared in the bill of exceptions.

The tender was made by Smith, without any request from Dougherty. Its object doubtless was to relieve the plaintiff from further costs. It was immaterial to Dougherty whether such a tender was made or not; and whether it prevails or not. He is the person ultimately liable for the damages and costs recoverable in the suit on the recognizance, and it is the same to him whether he pays them to Allen, or to Smith because he has paid them to Allen. The defence—the tender—is therefore wholly for Smith's benefit and at his own instance.

Taking this view of the case it is the opinion of the court, that Smith does not show any employment express or implied from Dougherty to defend the suit, and therefore that he cannot recover, for the items in dispute, in this action.

The exceptions of the defendant, as to the allowance of the items numbered 29, 30, 31, 32, 33, 34, are sustained, and therefore judgment is reversed and judgment is rendered for the plaintiff to recover only the amount for which the county court rendered judgment after deducting the above items and the interest, if any, allowed upon them. The defendant will also be allowed his costs in this court, to be deducted from the plaintiff's judgment.

Amasa Briggs v. John H. Boyd.

Promissory Note. Principal and Surety. Pleading. Costs.

It is no defence for a surety upon a note that the principal got it discounted by a different party from the one agreed upon with the surety.

The plaintiff and defendant signed the note in question as sureties with the principal, R., payable to H., or order, and knowing that H. was only to indorse it, not to sign it with them. *Held*, that H. was not subject to contribution as a surety.

If a surety has no notice of a suit against a co-surety, he is not bound by the judgment; and may therefore show in a suit against himself by the co-surety for contribution, any legal defence which he might have pleaded in bar of a suit upon the note.

But he cannot set up a partial falure of consideration, not subject to computation, between the original parties as a defence *pro tanto*.

A surety may recover in a suit against a co-surety for contribution a proportionate share of the taxable costs which he had to pay in the suit upon the note against himself, both being equally in fault in not paying the note.

Assumpsit for money had and received, money lent and advanced, money paid, and on an account stated. Pleas, the general issue, and the statute of limitations. Replication, traversing the latter plea. Trial by the court, by the consent of the parties, March Term, 1864, Kellogg, J., presiding.

On trial, the plaintiff introduced and read as evidence a certain promissory note for seven hundred dollars, dated at Whitehall, New York, on the 28th January, 1852, and jointly and severally executed and made payable to the order of A. W. Hyde, at the Bank of Orwell, in this state, in three months from date, and signed by D. M. Resseguie, J. H. Boyd, (the defendant,) and Amasa Briggs, (the plaintiff,) and indorsed by the said A. W. Hyde. No question was made in respect to the genuineness of the said signatures and indorsement. The following facts appeared on the trial, viz: At the time of the date of the said note, Resseguie and the defendant resided at Whitehall, the plaintiff resided in Benson in this county, and Hyde resided in Castleton in this county; and from the time of the date of said note to the present time, there has been no change in the place of residence of either of said four persons. The note was executed for the exclusive benefit of Resseguie; and the defendant and the plaintiff were merely accommodation signers, and Hyde was an indorser of the same, merely and solely for the accommoda-

tion of Resseguie. The note, within a day or two after its date, was brought by Resseguie to the plaintiff at his residence in Benson, with the names of Resseguie, the defendant, and Hyde then thereon as aforesaid; and the plaintiff then and there signed it at the request of Resseguie. When the plaintiff signed the note, he was informed by Resseguie that the defendant had signed, and that Hyde had indorsed it, for Resseguie's accommodation, and that he, Resseguie, was expecting to procure the money on it from Calvin P. Austin. The defendant signed the note at Whitehall, upon a distinct understanding and agreement with Resseguie that Resseguie should procure it to be discounted at the Bank of Orwell, for the purpose of raising money to carry on his business, but it did not appear that the plaintiff had any notice, information or knowledge in respect to this understanding and agreement. The said note was subsequently discounted by Austin for Resseguie, and not at the Bank of Orwell where it was made payable. Austin, on the 19th April, 1858, commenced an action on the note against the plaintiff, and recovered a judgment for $1032.50. damages, and for $40.28. costs of suit. An execution was issued on the judgment, and the plaintiff paid on said execution the sum of $1054.27. At the time of the recovery by Austin of the judgment as aforesaid, Resseguie was, and ever since that time has been insolvent.

The court was unable to find that there was any satisfactory balance of testimony showing that the defendant had any notice of said suit. But it did appear that, shortly after the plaintiff paid over the money on the execution as aforesaid, he informed the defendant of the suit, and that he had made the payment on the execution as aforesaid, and requested the defendant to pay to him his (the defendant's) share as co-surety,—and that the defendant declined to do this, or to acknowlege that he was under any liability arising from the said note. It also appeared that the plaintiff defended against the said suit of Austin so far as he was able.

On trial, the defendant offered to show by the testimony of Resseguie, that, as between Resseguie and Austin, there was a partial failure of the consideration received by Resseguie from Austin for said note, or on the discount of the same, by reason of certain property which was received by Resseguie, as a part of the considera-

tion, proving to be worthless, and to the amount of three hundred dollars. The defendant did not claim that the plaintiff ever had any notice or information in respect to this alleged partial failure of consideration; and the testimony in relation to the same, so offered by the defendant, being objected to by the plaintiff, was excluded by the court. To which decision the defendant excepted.

It did not appear that the note was protested for non-payment as against Hyde, or that any steps whatever were taken to hold or charge him as indorser thereon; and there was no proof of a new promise by the defendant to pay the said note, or any part thereof, to any party interested in the same, otherwise than by implication f law on the facts above stated.

Upon the foregoing facts, the court decided that the defendant was liable to contribution, as a co-surety with the plaintiff on the said note, for one-half of the amount paid by the plaintiff on the execution in favor of Austin against him as aforesaid, with the interest thereon from the time of making the said payment to the time of trial, and that the plaintiff was entitled to a judgment against the defendant on both of the issues made by the pleadings in the case; and judgment in favor of the plaintiff was rendered accordingly. To this decision and judgment the defendant excepted.

Prout & Dunton and *R. S. Peabody*, for the defendant.

I. The defendant, Boyd, is not liable to any extent for contribution as co-surety upon the note. (a.) He was discharged by the note's being discounted by Austin instead of at the Bank of Orwell as agreed upon. Parsons on Notes and Bills, vol. 1, 236; *Brown* v. *Tabor*, 5 Wend. 566; *Evans* v. *Kymer*, 1 B. & Ad. 528; *Woodhull* v. *Holmes*, 10 Johns. 231; *Small* v. *Smith*, 1 Denio, 583; *Roth et al.* v. *Colvin et al.*, 32 Vt. 126; Abbott's Dig. vol. 1, p. 468, § 470; Parsons on N. & B., vol. 2, pp. 27, 28, and note; Chitty on Bills, 90 and 91. (b.) No one is bound by a judgment to which he was not a party.

II. If liable to any extent, Boyd should be held for one-third of the amount of damages only recovered against Briggs. (a.) Hyde is liable as original promissor, or as co-surety with Briggs and Boyd. Theobald's Pr. and Agt., p. 197; *Daniel* v. *McRae*, 2 Hawks. 590; Theobald's Pr. & Agt., p. 202; *Douglas* v. *Waddle*, 1 Ham. R. 413;

Ohio Cond. R. 182; *Pitkin* v. *Flanagan*, 23 Vt. 160. Endorsement is a new promise. *Williams* v. *Field*, 3 Salkeld, 68; *Ballingalls* v. *Gloster*, 3 East, 481; *Hunt* v. *Adams*, 5 Mass. 358; S. C., 6 Mass. 519; *White* v. *Howland*, 9 Mass. 314; *Moies* v. *Bird*, 11 Mass. 435; *Palmer* v. *Grant*, 4 Conn. 89; *Brown* v. *Mott*, 7 Johns. 361, and opinion; *Allen* v. *Rightmere*, 20 Johns. 365, and opinion. (b.) A co-surety cannot recover from his co-sureties an aliquot part of the costs in a suit against himself. *Boardman* v. *Paige*, 11 N. H. 431; *Henry* v. *Golding*, 15 M. & W. 494 and 496; Parsons on N. & B. vol. 2, p. 253; *Knight* v. *Hughes*, 3 C. & P. 467; *Fletcher* v. *Jackson*, 23 Vt. 593; 7 Brigham, 246; Moody & M. 487; 11 Ad. & El. 23; Abbott's Dig. vol. 4, p. 619, § 47.

III. A note received and discounted, but not in the usual course of business, is open to all the equities existing prior to the transfer, and accruing to any of the original parties thereon, and any defence of a surety in equity is a good defence also at law. Austin paid for the note only about four hundred dollars. He was therefore entitled to recover only the amount *actually* paid, with lawful interest thereon. *Springer* v. *Toothaker*, 43 Maine, 381; Byles on Bills, p. 189 and note; *People* v. *Jansen*, 7 Johns. 332; *Baker* v. *Briggs*, 8 Pick. 122; *Evans* v. *Kymer*, 1 B. & Ad. 528; Parsons on Notes and Bills, vol. 1, 236; *Sailly* v. *Elmore*, 2 Paige, 497; *Russell* v. *Buck*, 14 Vt. pp. 147 and 157; *Bay* v. *Coddington*, 5 Johns. Ch. 57; Chitty on Bills, 90 and 91; Parsons on N. & B., vol. 1, p. 256, *et seq.*; *Roth & Co.* v. *Colvin et al.*, 32 Vt. 126.

Evidence showing that the note was not received "in the usual course of business" is admissible. *Rose* v. *Dickson*, 7 Johns. 196; *Bank of Burlington* v. *Durkee et al.*, 1 Vt. 399; *Bank of St. Albans* v. *Stearns*, 1 Vt. 430; *Pitkin* v. *Flanagan*, 23 Vt. 160; Parsons on N. and B., vol. 2, 408; *Eggleston* v. *Shotwell*, 1 Johns. Ch. 536; *Schermerhorn* v. *Tallman*, 14 N. Y., pp. 93 and 115; *Austin* v. *Harrington*, 28 Vt. 130; *Whitmarth* v. *Young*, 5 Randolph, (Va.) 333; Boyd on Us. 289, §§ 17, 20, 24; *Gibson* v. *Trustee*, 1 Call's R. 54.

(c.) This is not an action upon the note, but an action of assumpsit. Therefore evidence to show partial failure of consideration was admissible,—the defendant's liability as co-surety being specific and ascertained, not subject to the estimation of the jury. Parsons on

N. & B., vol 1, p. 207; *Richardson* v. *Sanborn*, 33 Vt. 75; *Pulsiver* v. *Hotchkiss*, 12 Conn. 234; *Hills* v. *Bannister*, 8 Cowen, 31.

Edgerton & Paul, for the plaintiff.

This action is not within the statute of limitations. 1 Parsons on Con. 35 and 36, n. (p.); 2 Parsons on Notes and Bills, pp. 253–4; *Davies* v. *Humphreys*, 6 M. & W. 152. The defendant is liable as co-surety on the note, to contribute one-half of the amount paid on the execution to Austin, and the interest since. 1 Parsons on Con. 34, 35 and 36; *Fletcher et al.* . *Jackson*, 23 Vt. 593. Notice to the defendant of the pendency of the suit against the plaintiff was not required. Neither is the plaintiff obliged to show that he has paid it by compulsion to enable himself to recover. Addison on Con. § 673; *Pitt* v. *Purssord*, 8 M. &. W. 539; *Chaffee* v. *Jones*, 19 Pick. 261; The defendant is not discharged from liability because the note was not negotiated by the Bank of Orwell. *Bank of Middlebury* v. *Bingham et al.*, 33 Vt. 633; *Bank of Newbury* v. *Richards*, 35 Vt. 281. Hyde never agreed or consented to become a co-surety with Briggs and Boyd. He was an indorser merely, therefore not subject to any contribution. He was discharged through want of notice. *Keeler* v. *Bartine*, 12 Wend. 110; *French's Ex'r* v. *The Bank of Columbia*, 4 Cranch, 141; 1 Parsons on Notes and Bills, p. 556.

The testimony of the maker offered to show any failure of the consideration was properly rejected.

1. The plaintiff was ignorant of it when defending against Austin.

2. The maker would thereby have disparaged his note by his own testimony. *Warren* v. *Merry*, 3 Mass. 27; *Chandler* v. *Mason*, 2 Vt. 199; Phillips on Ev., vol. 3, pp. 25, 27 and 31, (C. & H.'s notes vol. 1); *United States* v. *Dunn*, 6 Peters, 51; *Hartford Bank* v. *Barry*, 17 Mass. 94.

Aldis, J. 1. Numerous decisions in this state have settled the point, that it is not a defence to the note for Boyd as surety, that the principal got it discounted by Austin instead of by the Bank of Orwell, as he had agreed with Boyd that he would. *Bank of Newbury* v. *Richards*, 35 Vt. 281; *Bank of Middlebury* v. *Bingham*, 33 Vt. 621.

2. Hyde did not sign the note as surety with Briggs and Boyd. The note was payable to Hyde or order, and they signed it as sure-

ties with Resseguie, knowing that Hyde was only to indorse it—not to sign it with them. The form of the contract plainly shows the intent of the parties—that Hyde as payee and indorser was not surety with the signers, but would, if made liable by presentment, protest and notice, have a remedy against the makers.

Such is the legal effect of the contract as written, and there is nothing in the case to show that the real relation of the parties was different.

3. The defendant had no notice of the suit, Austin v. Briggs, and therefore is not bound by the judgment. He may therefore show any legal defence which he might have pleaded in bar of a suit upon the note against him.

4. He offered to prove "a partial failure of consideration, by reason of certain property, which was received by Resseguie as a part of the consideration, proving to be worthless, and to the amount of three hundred dollars." Could this defence of partial failure of consideration be legally pleaded to an action upon the note brought by Austin against the makers? The general principle that a partial failure of consideration cannot be set up as a defence *pro tanto* to an action on a note has often been affirmed in this state. Quite recent cases have recognized it. *Burton* v. *Schermerhorn*, 21 Vt. 289; *Richardson* v. *Sanborn*, 33 Vt. 75—Ch. J. REDFIELD; *Harrington* v. *Lee*, 33 Vt. 249—Judge BARRETT.

In these later cases the old and more general statement has been qualified thus—that a partial failure of consideration is not to be shown by way of defence in a suit upon a note, where the sum to be deducted "cannot be ascertained by *computation*"—(BARRETT, J.)—"is unliquidated, and subject to the estimation of the jury"—REDFIELD, Ch. J.

In the more recent case of *Kelly* v. *Pember*, 35 Vt. 183, Judge PECK remarks: "There are some authorities to the effect that where the failure of consideration is partial, and of an uncertain character, and to be assessed by the jury and not mere matter of computation, such partial defence cannot be received in an action on a note; and perhaps the cases in this state countenance or sustain that proposition. But I never could see why such defence ought not to be allowed in actions on notes and bills of exchange as well as in other

actions, except where the suit on such paper is by an innocent holder for value. If there is such a rule there ought not to be; it is sustained by no principle of policy, convenience or justice." These remarks indicate that the rule is far from meeting with the favor that seems once to have been extended to it in this state; but the case turned upon another point.

It is unnecessary at this time to review the decisions in other states or in England. The tendency is to allow the defence to be set up as between the original parties. The cases are very conflicting. Byles on Bills, (Sharswood's Notes,) p. 100, and Parsons on Notes and Bills, vol. 1, pp. 207 and 211, and notes and cases cited.

We are not disposed at this time to overrule the decisions which have heretofore been made in this state upon this point. Had Briggs offered to show this defence in the suit brought by Austin against him upon the note, it would doubtless have been excluded. To allow it to Boyd in this suit at the expense of his co-surety, Briggs, when it would not have been allowed to Briggs in the suit Austin against him, would be doing a manifest injustice as between these sureties whose rights, liabilities and equities, are and ought to be preserved equal.

The character of the testimony offered shows that the amount sought to be deducted could not have been the subject of computation; but on the contrary must have been unliquidated damages to be shown by the opinions of witnesses, and ascertained by estimation of the jury.

5. It is claimed that the plaintiff ought not to recover for one-half of the taxable costs which he had to pay in the suit Austin against him.

But this was a debt for which the plaintiff and defendant were jointly liable. Briggs was no more bound to pay the whole of it than Boyd. As between themselves each was to pay one-half. Had Boyd paid his half or offered to pay it before suit, there would then be ground for his saying that he ought not to contribute to the costs. But the costs were made in collecting the whole of the note of Briggs. As one appears to have been just as much in fault as the other in not paying the note, which led to the necessity of making the costs, we think they should bear equally the burden of the costs.

In *Fletcher et al.* v. *Jackson et al.*, 23 Vt. 593, the sureties recovered of their co-sureties not only a proportionate share of the taxable costs, but also of the expenses incurred in defending a suit. Where the setting up of the defence is reasonable, hopeful, prudent,—the expenses thereby incurred by a surety are held in that case to be a proper subject for contribution. To the same point is *Marsh* v. *Harrington*, 18 Vt. 150.

The English decisions on this point do not seem to harmonize. In *Kemp* v. *Finden*, 12 M. & W. 421, PARKE, Baron, held that in a suit on a debt, where the sureties by default of their principal were jointly liable, and one of them had paid the whole costs, he was entitled to recover of his co-surety his share. In 15 M. & W. 494, ALDERSON, B., seems to have been of a contrary opinion.

The same rule obtains in Maine as in Vermont: 17 Me. 64; 18 Me. 364. But *contra*, 11 N. H. 431.

There is nothing to indicate that the costs in this case which Briggs had to pay were enhanced by any neglect or default or unreasonable defence on his part.

Judgment affirmed.

DANBY BANK *v.* STATE TREASURER.

[IN CHANCERY.]

Banks.

The Danby Bank was in business several years without contributing to the bank fund, the directors giving bonds instead for the security of the bills and deposits. After 1856 the directors did not give bonds but paid into the fund. *Held*, that the liability of the fund attached at once upon the failure of the directors to give bonds.

Held, also, that the state treasurer was properly made a party to the application for the fund.

APPEAL FROM CHANCERY. The facts set forth in the petition, answer and replication, and the decree of the court, made at the March Term, 1864, KELLOGG, Chancellor, are sufficiently stated in the opinion of the court.

E. Edgerton, for the petitionee.

The four banks, that contributed the fund in question by C. S., ch. 84, § 6, are made its "*owners*," with the exception of that portion of it paid in by the Danby Bank; and one of these (The Farmers' Bank) has already, under § 13 of the same statute, claimed payment of its share from the state treasurer. These banks should therefore all be made parties to the present proceeding, that their respective rights may be conclusively settled by such order as the court shall make. Story's Eq. Pl. § 207; *Noyes* v. *Sawyer*, 3 Vt. 160.

The Danby Bank prior to the payment to the state treasurer of any part of the $750. had suspended its redemptions and all its business, and had finally failed and become insolvent, and although this payment was not intended, probably, as a fraud, it nevertheless has that effect upon the other safety fund banks, and should not subject them to the payment of the Danby Bank debts. See C. S., ch. 84, §§ 6, 7, and 8.

Another point which the court are requested to consider, is, whether the directors of the Danby Bank, having given bonds as they did, pursuant to § 57, p. 490 of the statutes up to the year 1856 could subsequently make their debts a charge upon the bank fund, by neglecting thereafter to renew their annual bonds. (§ 87, p. 495, C. S.) Especially when it does not appear when the insolvency actually accrued.

The decree should have been made for the amount of the bank fund merely, which is shown by the case to be but $13,125.

Prout & Dunton, on the same side.

1. When the directors gave bonds for the redemption of the bills, &c., the bank thereafter became exempt from all the provisions of the statute relative to the bank fund. C. S., p. 495, §§ 87, 88, 89.

It is absurd to contend that a bank might adopt this system of securing its bill holders and depositors by the bonds of its directors, until it was in failing circumstances, then elect a new board of directors, and, by their neglect or refusal to give the requisite bonds for the redemption of the bills and payment of the depositors, thereby charge the bank fund.

As to the construction of statutes not explicit, see Kent 521, and note and cases there cited.

This bank fund is the property of the banks that contributed it, (see C. S., p. 482, § 6,) and its owners can only be divested of it by a strict compliance with the statute. *Spear* v. *Ditty*, 9 Vt. 283; *Brown et al.* v. *Wright*, 17 Vt. 97; *Chandler* v. *Spear*, 22 Vt. 388; *Culver* v. *Hayden*, 1 Vt. 364.

The Danby Bank has not complied with the statute. The directors did not either give the requisite bonds or contribute to the bank fund, until after the bank failed.

If true that the bill holders and depositors have no security if their bank fund fails them, it does not alter the case. The equities of the owners of this fund, are, to say the least, equal to the equities of the bill holders and other creditors of the bank; and when the equities are equal, the law must prevail. 1 Story's Eq., p. 57; *Fitzsimmons* v. *Ogden*, 7 Cranch; Mitford Eq. Pl. 274.

G. W. Harman, for the receiver of Danby Bank, maintained that if the directors give bonds for the payment of bills and deposits, such act exempts the bank from all payments to the "bank fund," but this exemption exists only while the bonds are extant. The general provisions of the statute make it the duty of the bank to contribute to the "bank fund." The exception is that if the directors give the bonds to pay the bills and deposits, *while they are in office*, the bank shall "*thereafter*" be exempt from all payments to the "bank fund."

The court are called upon by construction, to give a meaning to the term "*thereafter*" as used in this statute. We claim that it should be limited to the period for which the directors furnish their bonds; that such is the only rational construction.

Should the decree of the court of chancery be affirmed, the cause should be remanded, untrammelled by any order which shall preclude the receiver or creditors from a full examination of the state of the "bank fund."

Peck & Fifield, for the creditors.

1. The act of 1840 permitting directors to give bonds is an exception to the general rule prescribed by § 1, ch. 84. All banks are safety fund banks unless the directors give bonds, &c. When therefore the directors of this bank ceased to give bonds they became *ipso facto* a safety fund bank, and if the treasurer of the state omitted to

collect their contribution, it was the fault of the state and not of these creditors.

2. But in September, 1857, the bank paid its full contribution for 1856 and 1857 and took the state treasurer's receipt for it. This made the bank a safety fund bank. It was competent for the state to waive the payment of the contribution on the day it was due. Instead of asserting a forfeiture for this neglect they waived it and took the money.

3. The answer alleges that the bank suspended the redemption of its bills, discontinued business and in fact failed before the payments were made to the safety fund. The case, however, shows that the bank elected directors in 1856 and 1857, kept up its organization, and made the payments before mentioned in 1857, so that business was not entirely discontinued. Most of the banks in the state did in 1857 suspend specie payments and business. But,

4. Conceding all the answer claims, the bank would continue subject to the provisions of the safety fund act, until "*it shall become insolvent and have been proceeded against as hereinafter mentioned*;" § 9, ch. 84. This bank could not be regarded as legally insolvent within the meaning of the statute until it was proceeded against as an insolvent corporation which was long subsequent to 1857. The 27th and following sections of the act point out the manner in which insolvent banks shall be proceeded against, and until these proceedings are commenced the corporation cannot be regarded as insolvent.

5. The Danby Bank then, being subject to the safety fund law, the decree of the chancellor was right and in accordance with the 9th section of chapter 84. *Elwood* v. *State Treasurer*, 23 Vt. 701.

PIERPOINT, J. This case comes before this court upon an appeal from an order of the court of chancery, made in the course of proceedings instituted to settle up the affairs of the Danby Bank, as an insolvent banking institution.

The order appealed from fixes the amount of debts against the corporation, the amount of assets applied towards the payment of such debts, and the balance still due; and directs the receiver, appointed to close the affairs of said bank, to apply to, and receive from, the treasurer of the state, in the manner provided by the statute, a sum sufficient to pay such balance.

This order is based upon the supposition that the bank fund, so called, in the hands of the treasurer of the state, is properly applicable to the payment of the said deficiency.

Before proceeding to make the said order upon the treasurer, the court of chancery caused said treasurer to be cited in, to show cause why the order should not be made. The treasurer appeared before said court, and resisted the making of the order, on the ground that the bank fund in his hands cannot properly be applied to the payment of such deficiency. The decision of the court being adverse to his claim, he has brought the question here by appeal. And the principal question now to be considered is as to the correctness of the order in this respect.

The Danby Bank was chartered in 1850. By the statute of this state then in force, every moneyed corporation having banking powers chartered subsequent to 1831 were required on or before the third Thursday of October in every year, to pay to the treasurer of the state a sum equal to three-fourths of one per cent. on the capital stock of said corporation paid in, (with certain exceptions not affecting this question,) until such corporation shall have paid into the treasury four and one-half per cent. upon its capital stock, to remain a perpetual fund, to be denominated the bank fund, and to be inviolably appropriated, and applied to the payment of such portion of the debts, exclusive of the capital stock, of any of said corporations that should become insolvent, as remain unpaid, after applying the property and effects of such insolvent corporation towards the payment of its debts. See C. S. 481–2.

The legislature of this state at its session in 1840 passed an act in relation to banks, in addition to the then existing law on the subject, which is incorporated into the Compiled Statutes, in which it was provided in section 8 of that act, and sections 56 and 57 of chapter 84 of the Compiled Statutes, that the directors of every bank, chartered, or re-chartered, at that or any subsequent session, should be liable to pay to the creditors and stockholders of such bank, all losses sustained in consequence of any violation, by them, of the provisions of that act, or of any other law, or other unfaithfulness in the discharge of their official duties; and to secure such liabilities, each of the directors are required to execute a bond to the treasurer of the

state, with sufficient sureties, approved by the bank commissioner, the aggregate amount of which bonds to be equal to the amount of the capital stock of such bank, actually paid in. See Compiled Statutes, 490. The statute requires these bonds to be executed, before the bank can go into operation, or the directors discharge the duties of their office.

By the 87th section it is provided that if the directors of any bank corporation subject to the provisions of this chapter shall execute bonds to the treasurer of the state, to the amount and with the security required in section 57, to be approved by the bank commissioner, and deposited with said treasurer, conditioned that such directors shall at all times pay and redeem according to law all the bills issued by such bank, and shall pay and refund all deposits made in such bank, when such payments are demanded, while such directors are in office, such bank shall thereafter be exempt from all payments, required to be paid in to the bank fund, and from all the provisions for the establishment, preservation and regulation of said fund.

It appears from the agreed facts in the case, that when the Danby Bank first went into operation in 1851, the directors executed bonds according to the provisions of the said 87th section, and continued so to do, until the annual election of directors of said bank on the 2d Tuesday in January, 1856, thus relieving the bank from the annual contribution to the bank fund, as otherwise required by law. After the said second Tuesday in January, 1856, the directors then elected did not execute bonds as provided by said 87th section, but continued the operations of said bank, and at a subsequent period, paid to the treasurer of the state, for the benefit of the bank fund, the required annual contribution for the years 1856 and 1857, amounting to the sum of $750.

It is now insisted on the part of the state treasurer, that the directors having once given bonds according to the provisions of section 87, and operated their bank under the system therein provided, a subsequent failure to execute such bonds does not leave the bank subject to the provisions of the law relating to the bank fund, but only makes them liable to be proceeded against, by the bank commissioner, in a court of chancery, as an insolvent corporation.

In testing the correctness of this position, it must be borne in mind, that the bank, when created, was made subject to the provisions of the law relating to the bank fund. No act of the bank was necessary to bring it within its provisions. It is not a case where it is necessary that the bank should make a choice, or take any action on the subject, to make its organization complete, or for the transaction of its business. When the directors have executed the bonds as required by the 57th section, they are authorized to discharge the duties of directors, and the bank to go into operation. The organization is perfect, and the corporation exists as a banking institution under the law, and is liable to make its annual contribution for the benefit of the bank fund.

By the 87th section a method is provided by which the bank may become exempt from this liability to contribute, and that is by the directors giving bonds to redeem the bills of the bank, and pay the deposits, while such directors are in office. The directors of the Danby Bank having executed such bonds according to the provisions of this section, the bank thereby became exempt from this liability. The question then arises, for what length of time did that exemption continue? The natural and common sense answer would seem to be, just as long as the facts, upon which the exemption was based, continue to exist, and no longer; or in other words, as long as the directors continued to execute such bonds; and that when they fail so to do, the liability under the bank fund law at once attaches, thus effecting the obvious purpose of the statute, that is security to the bill holders, either by means of the bank fund, or the directors' bonds.

But it is said that when the bonds are once executed, so that the exemption exists, by the terms of the statute the exemption is made perpetual, the language being that "such bank shall *thereafter* be exempt," &c. The word "thereafter" in its ordinary signification has no future limitation; but it is apparent that the word is not used in this section in that unlimited sense. To give it that meaning would defeat the object the legislature had in view, which was to provide a security for the redemption of the bills issued by the several banks in this state, through the medium of the bank fund, or the bonds of the directors.

If when the bank is once exempt by reason of the bonds, they are always thereafter exempt, the neglect of any board of directors, subsequently elected, to execute such bonds would leave the bill holders without any security for the redemption of the bills, beyond the ordinary assets of the bank, unless they could resort to the bank fund. Even if such neglect would make the bank liable to be proceeded against as an insolvent institution, that would afford no additional security to the bill holders. Again, the statute does not require the directors at any time, or under any circumstances, to give bonds of this character. It is optional with every board of directors to do it or not. When their bonds are once executed they stand as a substituted security to the bill holders, in place of the bank fund, so long as those bonds continue in force and operation as such security, which is in fact until the next annual election of directors. Then such bonds cease to have that effect, and new bonds become necessary to the continuance of the exemption. If they are not executed, the bank resumes its original position and obligation, under the law creating and regulating the bank fund.

We think it was the intention of the legislature, as evidenced by the language of the said 87th section in connection with the spirit and purpose of all our legislation upon this subject, to exempt the banks from contribution to the bank fund, so long as the directors of said banks should furnish security for the redemption of their bills, and the payment of depositors, by bonds executed according to the provisions of said section, and no longer; and that the word "thereafter" as used in that section should be taken and considered in that sense.

It is said that under this view of the statute the directors of a bank that is in embarrassed circumstances may, by neglecting to execute bonds, make the bank fund chargeable with the redemption of their bills, when said bank has never contributed anything to said fund, and this to the prejudice of those banks which had contributed. If this be so the fault is with the legislature, and this court cannot remedy the evil. The legislature in all these provisions was seeking to protect the bill holders, rather than those who should contribute to the fund. But the liability of the fund to redeem the bills of a particular bank is not made to depend upon the fact, whether the

bank has contributed much or little to the fund, or at all. If the bank had never contributed to the fund, or its directors executed bonds under said 87th section, and the proper authorities had neglected to discharge their duties, and the bank had continued its business until it failed, it will hardly be contended, I apprehend, that the fund would not be liable.

A question has been raised as to the propriety of making the treasurer of the state a party to this application. Whether to do so was the only proper course, it is not necessary now to inquire. We certainly see no impropriety in making him a party. The bank fund is in his hands; he is its keeper, and the only person who has any control over it; he represents the state in the matter. The object of the application was to obtain an order of the chancellor directing the treasurer to pay the bank fund in his hands to the receiver. On notice to him he appears and objects to the granting of the order on the ground that the creditors have no claim upon the fund, for the reasons which we have been considering. This it was clearly competent and proper for him to do. And probably there was no method by which this question could be so readily and economically settled as that adopted, and the chancellor was clearly right in entertaining it.

No question could arise upon this application of the receiver, as to the amount of the bank fund in the hands of the treasurer, the source from which it came, or the claims of others, if any, upon it. All questions of such a character, if they arise, must be settled in the course of other proceedings instituted for that purpose. The only question to be settled here is as to the right of the receiver to resort to this fund, and the amount which he is entitled to apply for, and recover, from the treasurer. These questions settled in his favor, the order follows as a matter of course. All this would be necessary if there was no money in the hands of the treasurer belonging to the bank fund—the statute pointing out the course to be pursued in such a case.

The decree of the chancellor is affirmed and the case remanded.

JOSEPH SHELDON *v.* RALPH PERKINS.

Division Line. New Trial. Jurors. Evidence.

While one is in possession of land in his own right as owner, he is to be regarded as owner, though he do not possess the legal title, and his acquiescence in a boundary line is as binding as though the legal title had been conveyed to him.

A motion for a new trial is addressed to the discretion of the county court, and their decision upon it, whether right or wrong, cannot be revised on exceptions. But if the court improperly reject evidence offered in support of the motion this would be an error revisable on exceptions.

An affidavit of one of the jurors offered not to show improper conduct in the jury, but merely upon what grounds the verdict was rendered, held inadmissible.

TRESPASS, for breaking and entering the plaintiff's close, in Fairhaven, on the 15th December, 1857, and cutting and carrying away certain trees therefrom. The plaintiff's writ was dated the 23d of January, 1858. Plea, not guilty, with notice, setting forth certain special matter relied on in defence. Trial by jury at the September Term, 1864, KELLOGG, J., presiding.

On trial, the title of the plaintiff to a lot of land in Fairhaven called the Sheldon lot, was fully established, and was not questioned; and the title of Laura Perkins, a daughter of the defendant, to a lot of land in Fairhaven called the Hamilton or Perkins lot, situated east of and adjoining the said Sheldon lot, was also fully established, and was not questioned. The controversy between the parties in this case was in respect to the true location of the dividing line between these two lots,—the plaintiff claiming that the south-east corner of the Sheldon lot and the south-west corner of the Hamilton or Perkins lot were one and the same corner, and that the said corner was at a certain hemlock tree turned up by the roots, and standing on the top of a ridge,—and the defendant claiming that the south-west corner of the said Perkins lot was at a stake and stones standing about six rods west, and about two and one-half rods south, of the said hemlock tree corner, under the ridge or hill, and on the east side of a swamp.

The plaintiff claimed both that the true original location of the south-east corner of his lot was at the said hemlock tree, and also that, even if it was not in fact originally located there, he had gained a title to the land bounded on the east by the line running northerly

in the course from the hemlock tree corner, by occupancy on his part up to that line, and on the part of the owners of the said Perkins lot, by a recognition of, and acquiescence in, that line as the true dividing line between the two lots for such a length of time as would give to him a perfect title up to that line.

In reference to this last mentioned claim, the plaintiff, as a witness for himself, testified as follows, viz: "There is a line there in that direction," (northerly from the hemlock tree corner,) "leading past the land which Mr. Perkins now owns, which we made and marked in 1836. Mr. Hamilton or Mr. Whipple then owned the land now owned by Mr. Perkins. This line was the subject of conversation between me and Mr. Hamilton while he held the title to the Perkins lot and was occupying it. Mr. Whipple occupied the lot after Mr. Hamilton. That line and corner was recognized as the line and corner between our lots by me and Mr. Whipple. Mr. Whipple cut up to one side of the line, and I to the other, and there never was any dispute between us about the line for twenty years. I think Mr. Whipple was in possession of the Perkins lot for from fourteen to eighteen years,—I don't know exactly how long."

Cyrus C. Whipple, a witness for the plaintiff, testified as follows, viz: "I took possession of this Perkins lot in the winter of 1836, under a contract to purchase, from Mr. Hamilton. I occupied it, and was in possession of it, until the fall of 1850, when I sold it to Ralph Perkins, the defendant. Mr. Hamilton pointed out the lines of this lot to me at the time I purchased it. He took me to the corner which is called here the hemlock tree corner,—where a hemlock tree had been turned up by the roots, and we started from that corner. I think he told me at the time that there was some dispute about the corner, but that he owned up to there at any rate, and might own some farther. He told me about where the lines run. When I was occupying that lot I claimed to the lines running east and north from the hemlock tree corner. When I made my contract to purchase of Mr. Hamilton, I knew nothing about the stake and stones corner, and he did not point that corner out to me. He told me that there was some dispute about the hemlock tree corner,—I think he told me that it was with Mr. Ranney and Mr. Gilbert.

On the part of the defendant, it appeared that the said Perkins lot

was conveyed by Hiram Hamilton to Laura Perkins, by deed dated April 22d, 1852. The said Hiram Hamilton, being called as a witness for the defendant, testified, among other things not bearing on the last mentioned claim of the plaintiff, as follows, viz: "I never knew of any one claiming east of this corner, (the stake and stones corner claimed to by the defendant,) until after or at the time of the arbitration between Ranney and Perkins, some ten or twelve years ago. I bargained the land to Whipple some four or five years after I sold the timber to Clemons. I sold the land to Whipple by the acre, and he was to give me ten dollars per acre. I showed the line to Whipple,—a line running from the corner under the hill east,—the same south line to which Perkins now claims. A year or two afterwards I went on to the lot and again showed the line to Whipple. I had then learned that Ranney claimed that the upper corner was the true corner, and I went to Mr. Ranney's to have him show the corner that he claimed to, and his son Oliver went with us, and showed the corner that they claimed to. I think I never had seen this corner on the hill before that time. I deeded the land to Laura Perkins, agreeably to an understanding with Mr. Whipple. I did not know that Mr. Sheldon claimed up to this corner prior to the arbitration between Perkins and Ranney. I don't know that I had anything to do with the lot while Whipple was in possession of it. * * * I received the pay for the land from Mr. Whipple, and nothing from any one else. I always supposed that I owned to the lower corner."

The defendant, being called as a witness for himself, testified, among other things not bearing on the last mentioned claim of the plaintiff, as follows, viz: "Laura Perkins is my oldest child. She gave me permission to cut timber on the premises conveyed to her by Mr. Hamilton. * * * I made the bargain for Laura with Mr. Whipple for this land. I think it was in 1850, and that the deed was given about two years afterwards. After I made the bargain, right off, the same season, I cut some tamaracks and ash for hoop-poles on this disputed piece. I also sowed two and one-half acres of wheat on the lot,—a portion of it being on the land in dispute,—a little piece of it. I have cut timber and firewood from the lot since. I have always claimed my south-west corner to be down under the

hill where the stake and stones are, and the south line to be a straight line running through from that. When I made the trade with Whipple I did not go on to the lot with him."

The plaintiff, in giving rebutting evidence, re-called Cyrus C. Whipple, who testified as follows, viz: "Ralph Perkins worked for me before I sold this lot to him. He was on the lot with me, and I discovered that the south line of my lot, or the line running from the hemlock tree corner between my lot and the Hurd lot, had been newly marked, and I spoke of it to Perkins, and he said that Macomber (a surveyor) had run it out for Gilbert. It was understood between us that the line was run from that corner. I think I always told Mr. Perkins that I never claimed any farther than the line running from the hemlock tree for my south line, for that was the tree which Mr. Hamilton showed to me for the corner. My conversations with Perkins about the line were before he purchased the lot."

In respect to the testimony above detailed, the defendant requested the court to charge the jury that "if Hamilton, at the time he first went on to the lot with Whipple, did not know of the existence of this hemlock tree corner claimed to by the plaintiff, and did show Whipple the lines leading from the said stake and stones corner, then the occupancy by Whipple of the Hamilton lot would enure to the benefit of said Hamilton to cover all the land embraced within the original survey of that lot,"—the title under said survey having passed to, and become vested in, said Hamilton, before the commencement of the said occupancy,—"as the said Hamilton was to sell the lot to said Whipple by the acre; and that no acquiescence on the part of Whipple in a dividing line leading north from the said hemlock tree corner as claimed to by the plaintiff could commence so as to be binding on Hamilton until the survey of the lot was made from Hamilton to Whipple, which was two or three years after Hamilton went on to the lot with Whipple for the purpose of showing the corners and lines of it to him." The court declined so to instruct the jury, but, upon this point, did instruct the jury as follows, viz: That if, after Hamilton sold the Hamilton lot to Whipple, and Whipple went into possession of the same under the said contract of sale, there was a continuous period of fifteen years during which the line running north from the said hemlock tree corner was recognized and

treated, or acquiesced in, as the true dividing line between the two lots by the adjacent land owners,—that is, by the plaintiff on the one side, and by Whipple and his successor in the ownership of the Hamilton lot, on the other side,—that line should be considered as binding upon Whipple and his successor in the ownership of the Hamilton lot, in or under whose right the defendant justified the alleged acts of trespass, notwithstanding the jury might find that the original and true dividing line between the two lots was in a different place, as claimed by the defendant. To the refusal of the court to charge upon this point, agreeably to the defendant's request, and to the charge as given, the defendant excepted. The jury returned a verdict in favor of the plaintiff for $21. damages.

After verdict, the defendant filed a motion for a new trial. On the hearing on said motion, the defendant offered as evidence in support thereof the affidavit of Benjamin W. Burt, one of the jurors of the jury by which the said verdict was returned, stating that the verdict was based upon the ground that the line claimed by Joseph Sheldon had been recognized and treated as the dividing line by the grantors of Laura Perkins for more than fifteen years before the execution of the deed to Laura Perkins. The plaintiff objected to the reception of this affidavit as evidence,—claiming that the same was inadmissible,—and the said objection was sustained. To this decision of the court the defendant excepted. No other testimony except the said affidavit was offered in support of the motion for a new trial, and the said motion was thereupon denied. To which the defendant excepted.

H. G. Wood and *E. N. Briggs*, for the defendant.

The exceptions show that the line claimed by the plaintiff did not exist prior to 1836, and that Hamilton, in whom the title of the Perkins lot then was, did not know of the existence of this line, or that the plaintiff claimed to own any of the premises in dispute until some ten or twelve years ago, when he had conveyed to Laura Perkins. Whipple went into possession under a contract to purchase, in February, 1836, but did not *in fact* purchase until a year or two after, when a survey was made, and the *quantity* and *price* ascertained. During the time that intervened between February 7th, 1836, and the time when the survey was made in 1837 or 1838, *at*

least Whipple must be treated as the *tenant* of Hamilton, and his possession of the premises or *any part* of them, must inure to the benefit of Hamilton, and no recognition by Whipple of a *wrong* line would be held binding upon Hamilton.

If Hamilton, at the time Whipple went into possession of the premises, pointed out to Whipple the corners and lines now claimed by the defendant as the boundaries of the lot, the possession by Whipple of *any part* of the lot would be extended by *construction* to cover *all* the land embraced in Hamilton's title, especially if neither Whipple nor Hamilton knew that the plaintiff claimed to a different line or corner, and the court should have so charged the jury.

The motion for a new trial was improperly denied.

The affidavit of the juryman was admissible for the purpose for which it was offered.

Prout & Dunton, for the plaintiff.

As a legal proposition, it is unquestionable, in regard to a dividing line between lands, that when adjoining *proprietors* recognize or acquiesce in a line, whether it is the true one or not, and occupy accordingly for fifteen years, that the line so acquiesced in will be treated as the actual line, and will not be disturbed. *Jackson* v. *Ogden*, 7 Johns. 238; *Jackson* v. *Freer*, 17 Johns. 29; *Jackson* v. *Van Corlaer*, 11 Johns. 123; *Hunt* v. *Johnson*, 19 N. Y. 279; *Beecher* v. *Parmelee*, 9 Vt. 352; *Burton* v. *Lazell et al.*, 16 Vt. 158; *Ackley* v. *Buck*, 18 Vt. 395.

The charge was in accordance with this principle. The testimony in the case does not justify the charge requested by the defendant.

The motion for a new trial was properly denied. *Bullock* v. *Beach*, 3 Vt. 73; *Newton* v. *Booth*, 13 Vt. 320.

The affidavit of the juror was not admissible to affect the verdict, *Downer* v. *Baxter*, 30 Vt. 467; 11 Cush. 337; 5 Hill, 560; 2 Tidd, 905. Also see *Ross* v. *Bank of Burlington*, 1 Aiken, 43; *Morse* v. *Crawford*, 17 Vt. 499.

POLAND, Ch. J. The general doctrine of the judge's charge, that if the line to which the plaintiff claims had been recognized, treated and acquiesced in for a continuous period of fifteen years, by the plaintiff on one side, and the predecessors in title of the defendant

or his daughter on the other, that the line would thereby become established and binding between them, is not denied by the defendant's counsel to be the law. The alleged error of the court below consists in not acceding to the defendant's request to charge. The request assumes facts as true which the exceptions do not show there was any evidence of, in order to avoid the effect of an acquiescence in the line by Whipple for a part of the time he was in possession of the land now owned by the defendant's daughter. That is, that Hamilton contracted to sell the land to Whipple by the acre, that it was subsequently to be surveyed and measured to ascertain the quantity, and that this was not done for two or three years after Whipple entered into possession, and that until this was done, Whipple should be treated as the tenant of Hamilton, and having no power to acquiesce in any boundary line so as to bind his landlord.

Nothing of this appears in the exceptions, and therefore any request for a charge based upon them cannot be regarded. The case shows that Whipple purchased the land of Hamilton, entered into possession, and occupied the land as his own for the whole period till he sold to the defendant in 1850. He never had a deed from Hamilton, but two years after he sold the land to the defendant, the land was deeded by Hamilton to the defendant's daughter.

While Whipple was thus in possession of the land, in his own right as owner, we think he is to be regarded as the owner, and that his acquiescence in a boundary line is as binding as if the legal title had been conveyed to him.

If the facts were true which are implied in the defendant's request to the court, and still Whipple in fact during the time, conceded and acquiesced in the plaintiff's line, it is by no means clear that this part of the time should be deducted from the whole period of his occupation. If he went in under a contract to become the owner of the land, and that contract was executed so that he did in fact become the owner, and he occupied as the owner for the whole time, we see very little reason for dividing the time. Although the legal title remained in Hamilton, he held it in trust merely for Whipple, who was the real owner, and Whipple really occupied the land as his own, and not as Hamilton's.

The evidence was contradictory as to the occupation, and acqui-

escence in the line. The plaintiff's evidence tended to prove that it was for more than fifteen years. The defendant's evidence tended to show that it was for a less period than fifteen years.

This was wholly a question of fact for the jury to decide, and unless all the evidence was one way, it was proper for the court to submit it to them to determine.

The motion for a new trial was addressed to the sound discretion of the county court, and their decision of it, whether right or wrong, cannot be revised on exceptions. This has often been decided by this court.

The only mode of bringing this question before this court is by a petition for a new trial, and if it were thus properly before us, it would be quite impossible for us to say upon the evidence detailed, that the verdict was so palpably and clearly contrary to the general tendency of the evidence, as to justify overturning the verdict.

The defendant also offered in aid of his motion for a new trial, the affidavit of one of the jurors, to show upon what ground the verdict was rendered, which affidavit the court refused to receive as evidence. If the court improperly rejected evidence in support of the motion, it would doubtless be an error properly revisable on exceptions.

It has long been settled in this state that affidavits of jurors will not be received to show any impropriety in the conduct of the jury, or improper mode of arriving at the verdict, in order to set it aside, and this is now the general opinion in the courts of all the states so far as we know. This affidavit was not offered to show improper conduct in the jury, but merely to show upon what ground the verdict was rendered.

But in our judgment it would be productive of great mischief to receive *ex parte* affidavits of jurors, after they have separated, for such a purpose. Where a case is submitted to a jury on various grounds, and where perhaps the result is not perfectly satisfactory to all of them, to allow them to be severally catechised after they have separated and had interviews and conversations with parties and counsel, and their affidavits brought into court to explain their verdict, would produce the greatest uncertainty and embarrassment. If the state of the case is such as to make it proper or important to

know the ground upon which a verdict of the jury is given, the proper course is to suggest it to the court so that it may be learned from the jury in open court, while they are together and under the control and direction of the court.

The affidavit was properly excluded.

The judgment is affirmed.

SQUIRES & SHERRY *v.* HEMAN BARBER.

Agency. Set-off.

C. was the plaintiff's agent for selling the goods in question, a chest of tea and barrel of molasses, and goods of this character, and, at the time of the sale to the defendant, was insolvent and was endeavoring to effect a compromise with his creditors; he owed the defendant twenty dollars and agreed to pay that debt out of the price of the goods sold him, in consideration that the defendant would assist him in compromising another of his debts; he at the same time told the defendant he was not carrying on business in his own name. *Held*, that these facts were sufficient to put the defendant on inquiry as to C.'s true relation to the goods and of his lack of authority thus to dispose of them, and being so affected with notice he cannot set off his claim against C. in an action for the goods by C.'s principal.

ASSUMPSIT for goods sold and delivered. The case was referred to a referee who reported that Peter McDonal, Norman B. Squires and John Sherry were partners in business under the firm name of McDonal, Squires & Sherry, at the time of the purchase of the bill of goods in question; that since that time and before the bringing of this suit, Peter McDonal had deceased, and Norman B. Squires and John Sherry are the surviving partners of said firm; that the defendant sometime in the month of February, 1859, purchased the following goods of one P. W. Converse, viz: one chest of tea and one barrel of molasses; that Converse was at the time of the purchase of the above goods, the authorized agent of the said firm for selling such goods; that he was at this time insolvent, and was attempting to effect a compromise with some of his creditors; and was owing the defendant at this time the sum of twenty dollars; and also was owing the estate of Gains Briggs of which estate the

wife of the defendant was an heir; that at the time and immediately preceding the purchase of the goods, Converse agreed to pay the defendant his said claim of twenty dollars, if he (the defendant) would assist him in compromising the Gains Briggs claim, which the defendant did aid him to do; that the understanding between the defendant and Converse about the payment for the above goods was, that the said twenty dollars which Converse was owing the defendant should be applied in payment for them, and if there was any balance either way it could be settled between Converse and the defendant at some subsequent time; that Converse was not authorized by said firm, the plaintiffs, to sell their goods in payment for his, Converse's, debts, but was authorized to sell them for cash or approved credit; that the defendant has always been ready to pay Converse the balance due on said bill of goods, after deducting therefrom the said sum of twenty dollars; that about two or two and one-half months after the purchase of said goods, the defendant received at the post office in Fairhaven, the bill of them; that the said bill was probably sent soon after the goods were shipped, but failed to reach the defendant sooner on account of being directed to him at Fairhaven instead of Benson where he was accustomed to receive his mail matter; that the defendant never knew until he was called upon for payment of this bill of goods in the spring of 1860 by one Pitts, that the plaintiffs claimed any pay from him, Converse never having at any time disclosed to the defendant that he was the agent of said firm, and was selling goods for them; that at the time of the purchase of said goods, Converse told the defendant that he was not doing business in his own name, and consequently the defendant was not surprised when he received the annexed bill, made out in the name of said firm.

The said claim of twenty dollars due the defendant from Converse was a balance due on a book account between them.

On the hearing on said report at the September Term, 1864, Kellogg, J., presiding, the court decided that the defendant was entitled to recover his costs, and rendered judgment accordingly. To this decision and judgment the plaintiffs excepted.

Prout & Dunton and *R. S. Peabody*, for the plaintiff.

The referee having found that the goods belonged to the firm of

which the plaintiffs are surviving partners, and that Converse was acting as the agent of said firm, the plaintiffs are entitled to recover, although Converse did not disclose his agency, and the defendant supposed he was dealing with him as principal. *Edwards* v. *Golding et al.*, 20 Vt. 38; *Huntington* v. *Knox*, 7 Cush. 371; *Taintor* v. *Pendergast*, 3 Hill, 72; Story on Agency, pp. 479 and 485; *Isley* v. *Merriam*, 7 Cush. 243.

The only question in the case is as to how much the plaintiff's are entitled to recover; whether they are entitled to recover their whole bill, or whether the $20. debt due from Converse to the defendant should be allowed in offset.

The facts found by the referee were sufficient to put the defendant upon inquiry as to the ownership of the goods.

The bill sent the defendant was notice to him as to the ownership of the goods, and as nothing was credited upon it, it was also notice to the defendant that the plaintiffs did not agree to the offset, and the defendant should have returned the goods or else pay for them in full. *Pratt* v. *Wiley*, 12 E. C. L. 164.

H. G. Wood, for the defendant, maintained, 1st, that the defendant would be entitled to offset his claim against Converse (twenty dollars) against the claim of the plaintiffs. 7 T. R. 360, n. 3.

2d, The plaintiffs cannot recover of the defendant the balance of their bill ($9.09) because the defendant purchased the goods of Converse as *principal*, and never authorized Converse to purchase goods for him of the plaintiffs or any one else. The bill, in view of what Converse told the defendant, did not operate as notice to the defendant that the plaintiffs owned the goods or relied upon him for payment, and the defendant had a *right* to suppose that all the demands for payment were for Converse's benefit.

POLAND, Ch. J. If an agent for the sale of goods, sell them in his own name, without disclosing his principal, an action may be maintained for the price in the name of the principal. Story on Agency, 479; *Edwards* v. *Golding et al.*, 20 Vt. 38.

And this doctrine seems to be generally recognized by all the authorities. This makes the right of the plaintiffs to recover clear for the amount of their bill, above the defendant's debt against Converse the agent.

Converse had no authority to sell the plaintiffs' goods in payment of his own debts, and his attempt to do so was unauthorized and unlawful as against the plaintiffs.

If however an agent authorized to sell goods for his principal, sell them in his own name, without disclosing his principal, and the purchaser has no knowledge of the principal, and there are no circumstances sufficient to excite suspicion, or put him on inquiry, as to the right of the agent to deal with the goods as his own, in such case, the purchaser when sued by the principal may set off any claim he has against the agent, as well as if the suit were brought in the name of the agent. Story on Agency, 487, § 404, and authorities cited in note 3.

The report does not show that the defendant, when he made the purchase of the goods, had knowledge that Converse was only an agent and did not own the goods.

Had he knowledge of such facts as ought to have led him to suspect his want of authority to thus deal with the goods as his own, or to use the language of the cases, to have put him on inquiry? We think from the facts reported that he had.

Converse was insolvent, and at the very time of the sale was endeavoring to effect a compromise with his creditors; he owed the defendant twenty dollars, and he agreed to pay that debt out of the price of these goods, in consideration that the defendant would assist him in compromising another of his debts.

He told the defendant at the same time that he was not carrying on business in his own name. This language in connection with the character of the goods sold, (a chest of tea, and a barrel of molasses,) clearly implied the existence of a mercantile establishment, for the sale of heavy groceries, carried on in the name of somebody other than Converse.

This taken in connection with the defendant's knowledge of the insolvency of Converse, and his efforts to compromise his debts, were enough to cause any careful and reasonable man to doubt whether Converse was himself the real owner of the establishment and the goods, with the right to dispose of them in payment of his debts.

We think therefore the defendant must be held affected with notice

of Converse's true relation to the goods, and of his lack of authority thus to dispose of them.

The cases where it has been held that the purchaser from an agent without full knowledge that he was such, but still under such circumstances of suspicion as to affect him with notice, or put him on inquiry, are so varied in their circumstances, that one can hardly be quoted as authority for another. The case of *Pratt* v. *Willey*, 2 C. & P. 350, 12 E. C. L. 164, will perhaps illustrate the principle as well as any.

Surtus was the plaintiff's agent for selling coal. He contracted with the defendant, a tailor, for some clothes, to be paid for in coal, and the clothes were made and delivered to Surtus. When the coal was delivered a ticket was sent with it, in which the plaintiff's name appeared as the seller. It was held that this was enough to put the defendant on inquiry as to the situation and authority of Surtus, and the plaintiff was allowed to recover for the price of the coal.

This result seems no particular hardship on the defendant, as he still has all the rights against Converse for his debt that he had before he purchased the goods. He merely loses the right of keeping the plaintiff's goods in payment of Converse's debt.

Judgment reversed and judgment for the plaintiffs for full amount of their bill.

HENRY A. SUMNER, *Administrator of* WILLIAM W. FORD, *v.* CHARLES BEEBE.

Interest. Bond. Mortgage.

The plaintiff's intestate became the owner of the land in question by devise, but charged with the payment of $100. to each of his brothers and sisters living at the decease of M. Subsequently the intestate conveyed the land to F., who executed to the intestate a bond that on the decease of M. he would pay these legacies to the said legatees if then living, and if any died before the decease of M., the share of such to the intestate, and secured the payment of the bond by a mortgage of the same land to the intestate. One of the intestate's sisters died

previous to M.'s death, and the $100. that became due the intestate by the terms of the bond was never paid, nor was any demand made for it until about the time of bringing this suit. *Held*, that the intestate was entitled to have interest added to said sum from the decease of M., as a charge or incumbrance on the land in the hands of the defendant, to whom it came by several intermediate conveyances from F., the death of M. being an event equally within the knowledge or means of knowledge of the defendant as the plaintiff.

EJECTMENT for a tract of land in Rutland. The case was tried by the court, KELLOGG, J., presiding, at the September Term, 1864, under the plea of the general issue. Judgment was rendered for the plaintiff to recover the seizin and peaceable possession of the land. A hearing was then had to determine what sum was equitably due the plaintiff for the breaches of the bond and mortgage in question. The plaintiff claimed and the court decided that interest should be computed and allowed from and after the time of the decease of one Mary Ford, up to the time of the hearing, on the sum of one hundred dollars,—to which the defendant excepted.

The facts are fully stated in the opinion of the court.

Prout & Dunton and *R. S. Peabody*, for the defendant.

I. In order to charge the defendant with interest upon the amount claimed, it must be shown either,

1. That there was an express stipulation, or obligation to pay it. Chitty on Con., p. 504; *De Havilland* v. *Bowerbank*, 1 Camp. 50; *Catlin* v. *Bragg*, 15 East. 223; Sedgwick on Damages, 375, and opinion of ABBOTT, Ch. J.; *Abbott* v. *Wilmot*, 22 Vt. 437; *Hubbard* v. *Ch. Br. R. R.*, 11 Met. 124; Mass. Dig., vol. 2, p. 115, § 26; Parsons on Con., vol. 2, p. 381, and notes; *Freehling* v. *Schroeder*, 2 Bingham, N. C. 17.

2. That the money was wrongfully obtained or tortiously withheld, and used at a profit. *Lee* v. *Munn*, 8 Taunton, 45; *Crane* v. *Thayer*, 18 Vt. 162; *Goff* v. *Rehoboth*, 2 Cush. 475; *Jacob* v. *Adams' Ex'r*, 1 Dallas, 52; *Williams* v. *Storrs*, 6 Johns. Ch. Rep. 358; *Abbott* v. *Wilmot*, 22 Vt. 437; *Hubbard* v. *Ch. Br. R. R.*, 11 Met. 124.

3. That the money to be paid was a sum certain, at a specified time, and that both these facts were known to the party in default. *Goff* v. *Rehoboth*, 2 Cush. 475; *Kane* v. *Smith*, 12 Johns. 156 and 158, opinion; 5 Pick. 106; Chitty on Con., p. 504.

4. That there had been a demand for payment, or its equivale in legal effect. *Goff* v. *Rehoboth*, 2 Cush 475; 5 Pick. 106; *Oriental Bank* v. *Tremont Ins. Co.*, 4 Met. 1; *Walker* v. *Bradley*, 3 Pick. 261; *Jacott* v. *Emmett*, 11 Paige, 142; *Sherwood* v. *Wooster*, 11 Paige, 441; *Buchanan* v. *Upshaw*, 1 Howard, 56; *Campbell* v. *Messier*, 6 Johns. Ch. R. 21; *Parker* v. *Thompson*, 3 Pick. 429; *Brewer* v. *Inh. of Tyringham*, 12 Pick. 547; *Johnson* v. *Durant*, 4 C. & P., 327; *B. & S. Glass Co.* v. *Boston*, 4 Met. 181.

II. The case shows neither of these four pre-requisites.

III. At all events the plaintiff should recover only the amount to which Emily Ford would have been entitled in case she had survived. This, at most, would have embraced interest only from the time a decree of distribution was made by the probate court. G. S., p. 404, §§ 29 and 30; *Sargeant* v. *Dow*, 1 Dane Abr. 574; *Shobe* v. *Carr*, 3 Monford, 10; *O'Gilvie* v. *O'Gilvie*, 1 Bradf. 356; *Burtis* v. *Dodge*, 1 Barb. Ch. R. 77.

Nicholson & Ormsbee and *E. N. Briggs*, for the plaintiff.

I. Emily Ford, one of the original legatees under the will of Daniel Ford, died in 1842; and by the provisions of the bond of Adonijah Ford, the contingency of her death was to accrue to the benefit of William W. Ford.

Mary Ford died January 16th, 1853, and thereupon the sum of one hundred dollars, being the sum "*which should have been paid to*" Emily Ford, had she survived, became due and payable to the plaintiff's intestate.

No other or further contingency, nor any act on the part of any person was necessary to create or perfect the liability.

Money due and payable under a contract which is silent on the subject of interest, should draw interest from the time that the same became payable, and should have been paid. *Vt. & Can. R. R. Co.* v. *Vt. Cen. R. R. Co. et al.*, 34 Vt. 2; Mass. Dig., vol. 2, p. 114, § 13; *Barnard* v. *Bartholomew*, 22 Pick. 294.

II. The purchaser of mortgaged premises, stands in no more favorable attitude toward the mortgagee than the original mortgagor. If he would relieve the land from the incumbrance, he must pay principal and interest. *McDaniels* v. *Lapham et al.*, 21 Vt. 222.

POLAND, Ch. J. The plaintiff's intestate became the owner of the land by devise, but charged, among other things, with the payment of one hundred dollars each, to his brothers and sisters, living, on the decease of his aunt, Mary Ford. In 1837, the intestate conveyed the land to Adonijah Ford, who executed to the intestate a bond that on the decease of Mary Ford, he would pay these legacies of one hundred dollars each to the said legatees, being five in number, if then living, and if either of said legatees died before the said Mary, then to pay the amount of the share of such deceased legatee to the plaintiff's intestate, and the payment of said bond was secured by a mortgage of the same land from Adonijah to the intestate.

The land came by several intermediate conveyances from Adonijah Ford to the defendant.

Emily, a sister of the intestate, and one of said legatees, died in 1842, and said Mary Ford died in 1853. The one hundred dollars that was due to the intestate by the terms of Adonijah's bond, secured by the mortgage, had never been paid, and no demand or request was ever made for its payment, till about the time of the bringing of this suit. The single question presented by the case is, whether the plaintiff is entitled to have interest added to said sum of one hundred dollars since the decease of Mary Ford, when it was payable, as a charge or incumbrance on the land in the hands of the defendant.

In our view the question of interest stands precisely as if Adonijah had given the plaintiff's intestate a note for a hundred dollars, payable on the decease of Mary Ford, and secured its payment by a mortgage upon the land.

It is perfectly settled in this state, as a general rule, that after a debt for a fixed sum becomes due, so that it is the duty of the party to pay it, interest will be allowed as damages for the detention of the debt, though there is no contract for interest. In this case the amount of the debt was certain, but the time of the payment, instead of being at a fixed day, depended upon the happening of a future event, the death of Mary Ford.

The defendant says he should not be compelled to pay interest until he had notice of the death of Mary Ford, that he might have no knowledge when that occurred.

When the time of payment of a debt depends upon the happening of a future event, if that event is one that is peculiarly within the knowledge of the creditor, so that he will naturally have knowledge of its occurrence, which the debtor will not, then there is a manifest propriety in requiring that he should not require his debtor to pay interest for the delay of payment, until he has notified him of the event, that has made his debt due, and in such case no suit could ordinarily be maintained, till such notice was given. But where the event on which the time of payment depends, is one no more within the knowledge of the creditor than the debtor, then no such notice is required either to enable the creditor to sue, or to entitle him to interest. It is as much his duty to obtain knowledge of it as it is the duty of the creditor, and unless he has stipulated for notice, he must run his own risk of ascertaining when the debt falls due. No reason has been suggested why the death of Mary Ford was not an event equally within the knowledge, or means of knowledge, of the defendant as the plaintiff, as readily ascertainable by one as the other, and the case furnishes no ground to see any.

No notice or demand were therefore necessary.

We consider the question the same as against the defendant in a suit against the land, as it would be in a suit against Adonijah on his bond, for just to the extent the liability extends on the bond, the mortgage binds the land,—and the defendant, as a purchaser of the land, must be held affected with notice of all recorded incumbrances on the land, and standing in the shoes of the mortgagor. The allowance of interest, where there is no special contract to pay interest, is far more general in this country than in England, and in this state we have gone quite beyond many of the other states.

In England the cases are rare where interest is allowed, except there be a contract to pay it; they are rather exceptions than otherwise. In this state the general rule is that interest is given after the debt is due, without any special contract to pay. The cases where it is not given must appear to stand upon some special reason for withholding it. Most of the cases which the industry of the defendant's counsel has brought to our notice, are cases which stand upon some of these exceptions.

It is suggested that this is really a claim for a legacy, and that in

ordinary cases interest is not given on a legacy till there has been an order or decree for its payment. The reason for that is, that it is not due and cannot be enforced, till such order is made. In this case, though this sum originated in a legacy, it long since lost its peculiar legacy character, and became an obligation resting wholly in contract. The legal character of the contract is the same as if the contract had originated with the bond from Adonijah to the plaintiff's intestate. In our view interest was correctly added to the debt after it fell due upon the death of Mary Ford.

Judgment affirmed.

TOWN OF BENSON *v.* ROLLIN HITCHCOCK, *Administrator of* ELIZA ABELL.

Pauper. Contract.

The defendant's intestate for several years received aid from the town as she needed it, in the same manner as other poor persons, no charge being made for the same. In 1858 she obtained a pension by aid of an attorney employed by the town at her request. Prior to this she frequently expressed to the overseers and others who assisted her in behalf of the town, a regret of her inability to pay for the aid she was receiving, and, subsequently, she frequently promised them that she would remunerate the town so far as she might be able, and that she wanted what was left of the pension money at her decease to go to the town. The pension money was drawn each year by the agents of the town and invested for her, and no portion thereof was retained or used by the town, or by the intestate, except the interest, which she used for her support. Upon the death of the intestate, the town presented a claim for the aid furnished. *Held*, that the question whether the parties understood that this support was furnished under a contract for repayment, or under statutory obligation, was one of fact, to be found by the auditor to whom the case was referred, and the allowance or disallowance of items determined how the auditor regarded the fact to be in respect to each.

Held, that her expressions of regret and gratitude created no legal obligation on her part; nor were her promises to pay, under the circumstances, conclusive.

THIS was an appeal from the decision and report of the commissioners of claims against the estate of Eliza Abell, by which certain claims in favor of the town of Benson, the appellant, against the estate of the intestate were disallowed; and, on the taking of the

appeal, the appellant filed in the probate court a declaration on book account against the intestate.

The case was referred to an auditor who reported in substance, that the plaintiff presented a book of records of the town of Benson, in which is recorded the accounts of overseers of the poor, and other accounts; and interspersed with other accounts were the items of the plaintiff's account. The plaintiff kept no book and made no charges against the defendant other than as aforesaid, and the items of the account against the defendant were kept upon said book the same as the other accounts upon the book.

The auditor found that Eliza Abell was for forty years or more prior to 1861, an inhabitant of the town of Benson. She was about eighty years old when she died in April, 1862; her family consisted of herself, a daughter who was about sixty years old at her mother's decease, and a son, an idiot, who was a little younger. Mrs. Abell owned a house and lot in Benson worth three or four hundred dollars, on which she lived and kept one cow, and sometimes two. It did not appear that Mrs. Abell had any other means of support but this house and lot until she succeeded in 1858 in procuring a pension of forty-eight dollars a year, except what was provided for her by the town of Benson, and as to all the items of the plaintiff's account, commencing with and subsequent to March, 1855, the articles therein named were furnished to Mrs. Abell and delivered to her by the town of Benson, and the services were performed for her by said town, and the said articles and services were necessary for her support, and the rates are reasonable. As to the items prior to March, 1855, the auditor did not find that the articles were furnished to her. The only evidence to show the furnishing of articles in that portion of the account was the book above named. This finding was given subject to the opinion of the court upon the law applicable to the same.

It appeared that in 1858 Mrs. Abell was informed by the overseer of Benson that it was probable that she might procure a pension, whereupon she requested the said overseer to engage an attorney to prosecute the matter, which he did. The necessary services were performed and the pension was obtained, and the sum of $48. a year was drawn up to the time of her decease. The money was

drawn each year by the agents of the town, was put at interest, notes taken payable to Mrs. Abell, and the notes so remained until her decease, and no portion of this pension money was retained or used by the town, or by Mrs. Abell except the interest upon the same, as it became due from year to year, which she used towards her support. From these facts the auditor allowed, subject to the opinion of the court upon the law, the plaintiff's "account of expenses incurred by the town of Benson in obtaining a pension for Mrs. Eliza Abell," amounting to $30.42. Interest upon the same was allowed at $7.57. The auditor also allowed items for repairing fence and cutting hay $17.25. with interest.

The remaining items of the plaintiff's account amounted to $217.-13., and the interest to $82.78., commencing with March, 1855—amounting to $299.91. The auditor found that from said March, 1855, up to the closing of the plaintiff's account, the goods were furnished to Mrs. Abell, and the services performed for her as for other poor persons in the town of Benson who stand in need of relief; that prior to her obtaining a pension she often expressed to the overseers of said Benson and others a regret of her inability to pay for the aid she was receiving from the town, and subsequent to her receiving the pension she frequently promised to Amasa Briggs and J. J. Howard, then overseers of said town of Benson, and to others who were assisting her and providing for her in behalf of said town; that she would remunerate the town for her support so far as she might be able; that she said to said overseers at different times that she wanted what should be left of her pension money at her decease to go to the town. Mrs. Abell during the time she received aid from the town did all that was within her power to do to support herself. Upon these facts and the testimony, the auditor disallowed the residue of the plaintiff's account amounting as aforesaid with interest to $299.91., unless in the opinion of the court there was a legal and binding obligation upon Mrs. Abell—then the same is allowed.

The auditor further reported that the witnesses used by the plaintiff were inhabitants of the town of Benson and all testified under objection by the defendant. The following question by the plaintiff's counsel to A. Briggs and J. J. Howard, witnesses for the plaintiff,

was also objected to by the defendant, but the objection was overruled and the answer received, viz: "Whether at the time you furnished aid for Mrs. Abell, it was your intention to furnish such aid gratuitously or whether it was your intention that the town should be remunerated." The auditor found that the aid furnished while said Briggs and Howard were overseers of the town of Benson was not intended on the part of said overseers as a gratuity, but that the town should be remunerated.

After deducting $14.95. credits made by the plaintiff the auditor found there was due the plaintiff by the defendant the sum of $42.40., unless in the opinion of the court the aforesaid sum of $299.91 should be allowed,—in that case the sum due the plaintiff would be $342.31.

The cause was heard on the auditor's report at the September Term, 1864, AINSWORTH, Ass't J., presiding, and, on the hearing, the court *pro forma* rendered judgment in favor of the appellant for the sum of $342.31., and also for costs, and ordered that the judgment be certified to the probate court. To this judgment and order, the administrator of the estate of the said intestate excepted.

H. G. Wood and *Prout & Dunton*, for the defendant, maintained that there was no express promise to pay this account, and as to the liability of a pauper to reimburse the town for support rendered, *the rule is* that it cannot be recovered without a *special* contract *for* repayment. The law does not *raise* or *imply* any promise. *Bennington* v. *McGinness*, N. Chip. 45; 1 D. Chip. 44; *Groveland* v. *Milford*, 1 Allen, 23; *Deer Isle* v. *Eaton*, 12 Mass. 328.

Nicholson & Ormsbee, for the plaintiff.

The form in which the plaintiff's accounts were kept is of no importance. The validity of the account must depend upon other circumstances altogether. *Bell* v. *McLeran*, 3 Vt. 185; *Reed* v. *Talford*, 10 Vt. 568. Mrs. Abell's language amounted to an unconditional promise to pay for the support she received. *Cummings et al.* v. *Gassett*, 19 Vt. 308; *Bennington* v. *McGenness*, 1 D. Chip. 44.

The inquiry made by the plaintiff's counsel to Briggs and Howard was unobjectionable, alike in substance and in form. *Newel* v. *Ex'r Keith*, 11 Vt. 214; *Bailey* v. *Bailey*, 16 Vt. 656.

The plaintiff's witnesses were competent. *Pond q. t.* v. *Sage*, 1 D. Chip. 250; *Peacham* v. *Carter*, 21 Vt. 515.

PECK, J. The intestate, if liable, must be liable upon the ground of a contract express or implied. The auditor finds that what the town furnished for her support was furnished as for other poor persons in the town of Benson standing in need of relief. This finding is in reference to the principal portion of the plaintiff's claim. No charges were ever made against the intestate for what the town thus furnished for support, but the amount was picked out at the hearing from the records of accounts of overseers of the poor in the town clerk's office. This rebuts the presumption and repels the idea of a contract for payment, and throws the burden on the town to show a contract for payment. The auditor finds that prior to the intestate obtaining her pension in 1858, she often expressed to the overseers of the poor regrets of her inability to pay for the aid she was receiving from the town, and subsequent to receiving her pension, she promised some of the overseers who were assisting her in behalf of the town, that she would remunerate the town so far as she might be able, saying she wanted what should be left of her pension money at her decease, to go to the town. It is clear that the same presumption of a contract does not arise in this case as in case of individuals, where one under no obligation renders aid and support to another. The intestate was practically a pauper, and the town was bound by law to furnish her with necessary support, and it was a question of fact for the auditor to find, whether it was mutually understood that the intestate was becoming debtor for what the town furnished her, or whether it was understood to be furnished under the obligation imposed by statute. Her expressions of regret of her inability to pay, and her expressions of gratitude to the overseers, certainly would not create a legal obligation. What the auditor finds in relation to her promise to pay as far as she was able, is not, under the circumstances, conclusive; it depends on how the parties understood it. The conduct of the town tends to show it was not understood in the light of a contract. The town made no charges against her, but drew her pension from year to year from 1858, and instead of appropriating it to remunerate the town, the officers of the town loaned it out, taking notes payable to the intestate, and paying the

interest annually to her. With the exception of a few items, the auditor disallowed the plaintiff's account, and it must be taken that he found the fact that the support was furnished without any contract for payment or mutual understanding that any indebtedness was created. We are bound by this finding. But if the court were to pass upon the whole as a mixed question of law and fact, we should say the conclusion of the auditor disallowing the claim is well warranted from the facts reported.

The item for expenses of procuring the pension is somewhat of a different character. The intestate requested the town to employ an agent to procure the pension, and the town did so and paid the agent for his services and expenses. As the auditor has allowed this, it is to be presumed that he found that it was the mutual understanding that the town was to be paid. As to the other items which the auditor has allowed, the charges for cutting hay, making fence, &c., the auditor finds an express contract at the time for payment, and that the intestate did make some payments upon these items.

The items allowed by the auditor were properly allowed.

On the testimony of Briggs and Howard, in reply to a question to them as to their intention, the auditor finds that what was furnished by them while they were overseers, was not intended by them as a gratuity; but it is not found that the intestate so understood it, nor does it appear from the report that they furnished anything except what the auditor has allowed.

Judgment of the county court, which was for the larger sum, is reversed, and judgment for the plaintiff for the smaller sum, the $42.40. allowed by the auditor.

THRALL & SMITH, *Appellants*, *v.* JAMES E. SEWARD *Adm'r of* IRA SEWARD.

Partnership. Payment. Release. Evidence. Statute. Administrators.

Thrall & Pond had been law partners and as such had been retained by the defendant's intestate in certain suits. Pond sold out to the plaintiff Smith, and Thrall and Smith formed a new partnership, but Smith did not acquire the right to be substituted for Pond as partner with Thrall in their subsequent services in those suits without the consent of Thrall; but the services were rendered by the new firm, Thrall & Smith, jointly, Smith preparing and arguing the cases, and making the charges on the company books as other company business. This was done with the full knowledge of Thrall and the intestate, and without objection on the part of either. *Held*, that neither Thrall nor the intestate's administrator can now make objection that the claim for said services, is not a joint claim of Thrall & Smith.

After the intestate's death Thrall claimed these charges (being the items in dispute) before the commissioners as a several demand in his favor, and Smith as a partnership demand. Thrall's claim was allowed and paid, he giving a release under seal for the firm Thrall & Smith, though long after its dissolution. *Held*, that as the facts in the case do not show that the payment to Thrall was a fraud on Smith, the payment was valid and the release binding upon the firm.

Held, that Smith was a competent witness to testify on the part of the plaintiffs relative to the contract or understanding between Smith and Thrall as bearing upon the question whether these items were a partnership claim.

Under § 24, ch. 36, p. 327, General Statutes, which provides when, in case of the death or insanity of one party, the other may be a witness, it is held that a party has the same right to testify in actions of book account, and where the matter at issue and on trial is proper matter of book account, as in other actions, and in addition, the right to testify to the hand writing of his charges and when made.

APPEAL from the decision and report of the commissioners of claims against the estate of Ira Seward, deceased, intestate, on the disallowance of a claim on book account in favor of Thrall & Smith, the appellants, against the said deceased, to an amount exceeding twenty dollars.

The case was referred to John Prout, Esq., as auditor, who reported as follows: "I find that prior to the accruing of the plaintiffs' account, the plaintiff Thrall and A. Pond, Esq., were partners in the practice of law, at Rutland, and that during the existence of said partnership, they, the said Thrall & Pond, were employed by the deceased, Ira Seward, to defend the several suits referred to in the charges numbered from 1 to 18, inclusive, of the plaintiffs' ac-

count; that some time prior to the 16th day of March, 1848, Pond removed from said Rutland to the state of New York, but retained an interest in the business of the firm of Thrall & Pond, which had been commenced and was pending at that time. I further find that on the 16th day of March, 1848, the plaintiffs entered into co-partnership in the practice of law, at said Rutland, to take effect from that date, in which the plaintiffs were to share in proportions of two-thirds to said Thrall and one-third to said Smith in the new business of said firm, and which should be commenced from and after that date, but which co-partnership of Thrall & Smith did not, by agreement of the parties thereto, extend to and include the business, then on hand and pending, of Thrall & Pond. I further find that during the September Term, 1848, of the Rutland County Court, the plaintiff Smith entered into a negotiation with Pond, who was desirous of disposing of his interest in the business of Thrall & Pond, and then pending in court, and purchased his interest therein, and paid said Pond therefor the sum of one hundred and twenty-five dollars, and that this arrangement was made between them with the knowledge of the plaintiff Thrall, and that he made no objection thereto. The said Ira Seward also had notice of this arrangement from Smith and made no objection thereto. Thereupon the firm of Thrall & Smith entered an appearance in said firm name, in the cases referred to, and Smith assisted in their preparation for trial, argued them in court, and carried and entered the charges therefor in the company books of the plaintiffs, and upon their company docket, from time to time as their services were rendered.

I further find, that upon the point whether said charges should be allowed against the administrator of Ira Seward, the only question contested was whether said charges were the private claims of the plaintiff Thrall, or whether they were the claims of the plaintiffs Thrall & Smith, the administrator not contesting said charges in any other respect or particular. Thrall the plaintiff appeared before me for and on behalf of the administrator, though he did not appear on the docket as his attorney, and "*admitted*" before me that Smith was not interested in those claims or charges, and offered himself as a witness to testify upon the question made and contested as aforesaid.

To his admission as a witness the plaintiff Smith objected, but I allowed him to testify upon that point, as well as the plaintiff Smith, to which Thrall on behalf of said administrator also objected.

I further find that Thrall presented an account in his own individual name and for the same charges or services, before the commissioners on the estate of Ira Seward, and which were allowed in his favor, but when they were charged by Thrall on his books did not appear, and that Thrall gave a bond of indemnity to the administrator, with surety, to indemnify him against that portion of the claim of Thrall & Smith, and being the items in dispute in this cause. I further find, that a very few days before the hearing before me the administrator paid Thrall the amount of said allowance by the commissioners, and that Thrall thereupon executed and delivered to the administrator a release under seal in behalf of the firm of Thrall & Smith. Said release was offered in evidence by Thrall in behalf of said administrator, to the admission of which the plaintiff Smith objected. I find that said release was executed long after the dissolution of the plaintiffs, and but a few days before the hearing before me. Said release was admitted and read in evidence. I further find that the administrator did not appear before me on the hearing, and that he was represented by no other counsel than the plaintiff Mr. Thrall, and that with respect to his employment to defend this suit, he testified that he was to charge the administrator nothing for his services.

I further find that for several years past Thrall has been somewhat embarrassed, and has not during that time had any known property open to attachment, but whether he is actually insolvent or not did not appear, and no evidence was introduced showing whether Thrall was indebted to Smith on account of said partnership or not.

The plaintiff Smith claimed that the execution of said release was a fraud upon his rights upon the facts found, and that the plaintiff Thrall could not discharge said partnership claim after the dissolution of said firm. The questions are submitted to the court.

No question was made as to the other items of the plaintiffs' account, and it was conceded that they were entitled to recover the amount of those charges with interest thereon. The administrator, before the allowance of said Thrall's claim, as above set forth, by

the commissioners, was notified by Smith that said claim was a partnership claim of the plaintiffs, and that he should require him to pay it to him, Smith.

If, upon the foregoing facts, the court should be of opinion that the plaintiffs are entitled to recover the amount of said disputed items, I then find for the plaintiffs to recover of the defendant, to balance book accounts, the sum of $298.55, with interest thereon computed after one year, on the yearly balances up to the 1st day of October, A. D. 1864, and computed at $242.35,—making in the whole $540.90.

But if the court should be of the opinion that the plaintiffs are not entitled to recover said disputed items, I then find for the plaintiffs to recover to balance book accounts, the sum of $108.53, and interest computed as aforesaid at $86.34, making in the whole $194.87."

The defendant excepted to the report on the ground that the auditor improperly admitted the the testimony of W. H. Smith, one of the plaintiffs, although objected to by the administrator.

On the hearing on the auditor's report, at the September Term, 1864, KELLOGG, J. presiding, the court decided that the said Thrall & Smith, appellants, were entitled to recover against the estate of the said intestate the largest sum reported by the auditor, and rendered judgment for the same, with the costs of suit, accordingly, and directed the said judgment to be certified to the probate court. To the said decision, judgment, and direction, the administrator of the said intestate excepted.

R. R. Thrall, for the defendant, maintained that the release was valid and binding, though made after the dissolution of the partnership, and cited Gow on Partnership, p. 77 and note; *Salmon & Brown* v. *Davis*, 4 Binn. 375; *Arton* v. *Booth*, 4 Moore, 192; *Furnival* v. *Weston*, 7 Moore, 356; *Bulkley* v. *Dayton*, 14 Johns. 387; Collyer on Partnership, pp. 259, 378, 380, 381.

That the auditor mistook the law in admitting W. H. Smith to testify in support of the plaintiffs' claim. G. S., p. 327, ch. 36, § 24.

W. H. Smith, for the plaintiffs.

I. The plaintiff Smith was a competent witness upon the ques-

tion involved before the auditor, as to which his testimony was received. The question at issue was solely as to a contract between the plaintiffs. The case is not within the *mischief* for which the statute intended a *remedy*, but is within the *exception* in the statute. G. S., p. 327, § 24.

II. The release by Thrall should not be allowed to defeat the plaintiffs' claim. His interest is wholly *adverse* to the plaintiffs' claim. *Pierson* v. *Hooker*, 3 Johns. 68; *Bulkley* v. *Dayton*, 14 Johns. 388; *Robbins* v. *Fuller*, 24 N. Y. 572. Under the circumstances of the case it was a fraud upon Smith. Collyer, p. 475, § 501, and notes; *Gram* v. *Caldwell*, 5 Cow. 489, 493; *Dob* v. *Halsey*, 16, Johns. 34; *Everinghim* v. *Ensworth*, 7 Mod. 826; *Pardey* v. *Powers*, 6 Barr. 492. The case discloses a *scheme* by which to defeat the *valid* claim by settling the *invalid* one, and thus cheat the third party, a *bona fide* creditor,—therefore the release will not be allowed to operate as against the innocent party. *Barker* v. *Richardson*, 1 Y. & J. 365; *Phillips* v. *Claggett*, 11 M. & W. 83. Thrall could not discharge the claim after dissolution, his agency as a partner ceased on account of his insolvency. Story's Part. § 328; 1 Greenl. Ev., § 112, p. 140. Acts in breach of *his duty* not binding. Story's Agency, § 125; 3 Kent, 44, 45, &c. The defendant has *no interest* in this release. He is fully protected by the bond of Thrall and sureties.

In many of its features this case is distinguished from any and all the cases found, and should not be sacrificed under *technical* rules ordinarily applicable to cases somewhat similar. The *defendant* has never made any defence here. *He* is not represented here even by an attorney. Thrall does not claim any *employment*. The litigation is solely between the plaintiffs. This claim up to two days before the audit was wholly without pretence of defence.

PECK, J. It is insisted on the part of the defence that the items in dispute, being items numbered from 1 to 18 inclusive, never accrued to Thrall & Smith, but to Thrall alone. The items accrued for services as attorneys in certain suits in the county court during the co-partnership of the plaintiffs, but did not come within the scope of co-partnership articles of the plaintiffs, as their co-partnership contract did not embrace the business pending at the formation

of the partnership. Thrall & Pond had previously been partners, and as such retained by the intestate in those suits. When Smith bought of Pond his interest in the pending business of Thrall & Pond, he did not thereby acquire the right to be substituted for Pond as partner with Thrall in their subsequent services in those suits, without the consent of Thrall; but the services having been rendered by them jointly, Smith arguing the cases in court, the charges being made, as they accrued, to the intestate on the company books of the plaintiffs as other company business, with the knowledge of Thrall, and without objection on his part, he knowing at the same time that Smith had purchased Pond's interest, the assent of Thrall to treat these services as partnership business sufficiently appears. After such election and acquiescence he cannot, as between him and Smith, object. The intestate having been informed of this arrangement, and making no objection, and allowing Smith to act on it, it is too late for his administrator to make the objection that the claim is not a joint claim of Thrall & Smith.

The next question is whether these items have been paid or released in such manner as to bar a recovery for them. The payment to Thrall and release by Thrall must be regarded as a payment and release of these items *in fact*. The allowance in favor of Thrall by the commissioners was based on these items, and the payment was in fact a payment of these items. This also appears by reference to Thrall's release to the defendant. But it is insisted by Smith on the part of the plaintiffs, that the payment to Thrall is a fraud on him and ought to be disregarded. If the facts show that the transaction was a collusion between the administrator and Thrall to defraud Smith, and that it will have that effect unless set aside, it must be held inoperative. We see no bad faith on the part of the administrator. When both Smith and Thrall claimed these items before the commissioners, Smith claiming them as a partnership demand, and Thrall as a several demand in his favor, the administrator had a right to make the arrangement he did with Thrall to shield the estate from the expense of litigating a question between Smith and Thrall in which neither he nor the estate he represented had any interest.

There is nothing in the case showing that the payment to Thrall

will operate as a fraud on Smith. Generally, even after dissolution, either partner has a right to receive payment of partnership demands. What is stated by the auditor as to Thrall's pecuniary circumstances is not sufficient to show that the payment was a fraud on Smith. It does not appear but that as between Thrall and Smith, Thrall has a right to retain the money paid; for the auditor states that no evidence was introduced showing whether Thrall was indebted to Smith on account of the partnership or not. If we could assume that each was entitled to share in this entire demand in such proportion as he was to share in the partnership business, Thrall by this payment has not got his two-thirds of the entire demand. Even if the administrator was bound to pay to each his share, he was not bound to divide and apportion each payment. Suppose no payment had been made, and there should be a recovery in this suit to the full amount claimed, and the probate court should order the administrator to pay the debt; would not a payment of this debt to either partner be valid? But it is manifest that neither could object to a payment to the other until that other had received more than his share. The administrator has the same rights in relation to payments made pending the suit. The payment must be allowed in reduction of the plaintiffs' claim.

The defendant insists that the auditor erred in admitting Smith to testify on the part of the plaintiffs, relative to the contract or understanding between Smith and Thrall as bearing upon the question whether these items were a partnership claim. The statute provides that in all actions except actions of book account, when one of the original parties to the contract or cause of action in issue and on trial is dead or insane, the other party shall not be admitted to testify in his own favor; and further provides, (subject to the same exception of actions of book account), that where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, *unless the contract in issue was originally made with a person who is living and competent to testify*, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator. The object of the *proviso* was to protect the estate of a deceased person from an apprehended danger of allowing the surviving party to an alleged contract

or transaction to testify, when the other party is no longer alive to meet, contradict or explain it. In this case the liability of the deceased was not in dispute. That liability was not to be increased or diminished by the determination of the question upon which Smith was allowed to testify. The contract to which he testified was not a contract to which the deceased was a party, nor one in which he was interested. Both parties to that contract were alive and competent to testify.

The contract was collateral, but if it was "the contract in issue" within the meaning of the statute, Smith was a witness, as it "*was originally made with a person living and competent to testify.*" The case does not come within the mischief intended to be guarded against, and is not within the spirit and meaning of the prohibition already mentioned. Smith was competent to the extent he was allowed to testify, unless he is excluded by the last provision in that section, which is as follows: "Provided further, that in actions of book account, and where the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose hand writing his charges are, and when made, and no further." The restrictive provision last above recited is the only one which in terms applies to actions of book account, and if construed literally, the party in this form of action can never testify where the other party is dead, except to the hand writing of his charges and when made, and is excluded from testifying to other matters in relation to which he is allowed to testify in other forms of action. Considering that parties nearly ever since the organization of the state have been allowed to testify in actions of book account without reference to the decease of the other party, it can hardly be supposed that the legislature by this recent statute extending the right to parties in other actions to testify, intended to restrict the right in actions of book account, to more narrow limits than in other actions. We think, taking the whole section together, the intention was to give a party the same right to testify in actions of book account, and where the matter at issue and on trial is proper matter of book account, as in other actions, and in addition, the right to testify to the hand writing of his charges and when made. This interpretation may seem like doing violence to

the language, but a different interpretation, in our judgment, would be contrary to the purpose and intent of the legislature. The special clause in reference to book actions was designed, as we think, to enlarge the right in this form of action in the particulars specified, rather than to restrict it to a more narrow limit than that assigned to other actions. Under this construction of the statute, Smith was a competent witness to the point to which he was called to testify. It was indifferent to the intestate whether his liability was to Thrall & Smith, or to Thrall alone.

Judgment of the county court reversed, and judgment for the plaintiffs for the smaller sum found due by the auditor.

OLIVER HULETT, *Administrator of* SILAS J. HULETT, *v.* NEHEMIAH HULETT.

Evidence. Domicil. Administrators. Statute.

Where the question is to turn upon the character of the defendant's stay or abode in a certain place, whether it was permanent or temporary, evidence of his continued residence there is admissible as tending to prove his intent when he came there and while he remained there.

But the defendant may testify as to his intent in coming there.

And he may testify that while remaining there he paid taxes on personal property in another state, in the absence of any evidence as to the law of said state on the subject of taxation of personal property.

H. left home in 1849, and was never again heard from. After so leaving home the defendant received certain money due H. as his attorney. *Held*, that in an action for this money by H.'s administrator, the defendant was not a competent witness under § 24, ch. 36, G. S., but became competent by the act of November 22d, 1864, as the action was pending August 1st, 1863.

But if admitted to testify prior to November 22d, 1864, and the case is subsequently heard on exceptions in the supreme court, the act of November 22d cannot properly be urged in defence of such admission on the ground that on the next trial he would be competent.

INDEBITATUS ASSUMPSIT in five counts. Pleas, the general issue, the statute of limitations, and that the defendant and Silas J. Hulett, the plaintiff's intestate, when the said supposed causes of action ac-

crued, were residents of and had their respective domicils in Hampton, in the state of New York, and not elsewhere, and continued to reside there until the decease of the intestate, and that the defendant, ever since the decease of the intestate, has resided and had his domicil, and still resides and has his domicil, in Hampton, and not elsewhere. The plaintiff by his replication traversed the plea of the statute of limitations and the plea in respect to residence and domicil. The plaintiff's writ was issued and dated on the 17th of February, 1862. Trial by jury at the March Term, 1864, KELLOGG, J., presiding.

On trial the plaintiff introduced in evidence his letter of administration on the estate of the said intestate, duly granted by the probate court for the district of Fairhaven, and issued and bearing date on the 30th of October, 1861.

The plaintiff testified that the intestate, who was a half brother of the plaintiff, and a brother of the defendant, left his home in Hampton, N. Y., in September, 1849, and has never since been heard from. His father, Mason Hulett, died a short time before, leaving a large estate, and a portion of the plaintiff's intestate's share was paid to the defendant for the plaintiff's intestate, he claiming to be his attorney and having a written power of attorney from him; and this suit was brought to collect the same.

The testimony introduced on the part of the plaintiff further tended to show that the defendant was and always had been a single man; that prior to April, 1861, he always resided, and had his domicil, in Hampton, N. Y., but, for a portion of the time between 1858 and 1861, he was in the western states; that on or about the 1st of April, 1861, he went into the house and family of one Chauncey Wood, in Fairhaven in this state, as a boarder, and that he continued to board and reside at said Wood's from that time until this action was brought against him, and from the time of the commencement of this suit to the present time, the same as before, as tending to show what his intention was in going to the house of the said Wood to board, and in remaining there from April, 1861, up to the time of bringing this action. This testimony was objected to by the defendant, and excluded by the court,—to which decision of the court the plaintiff excepted.

The testimony on the part of the defendant tended to show that he, the defendant, always resided and had his domicil in Hampton aforesaid, and that he owned and carried on a farm there previous to and in April, 1861, and from thence up to the time of the commencement of this suit; that when he boarded in the house and family of the said Wood, it was only for a temporary purpose, and with no intention of changing his domicil from Hampton to Fairhaven, and that, during that time, he exercised his right as a voter in the state of New York by voting at the general election in said state in November, 1861, as he had been accustomed to do previously to that time. The defendant was called as a witness for himself and was permitted to testify upon the question made respecting the alleged change of his residence or domicil as aforesaid. In the course of his direct examination, he was asked the following question, viz: "What was your purpose or intention when you went to Chauncey Wood's in Fairhaven, and while you staid there, as to changing your domicil from Hampton to Fairhaven?" This question was objected to by the plaintiff on the ground that it was not competent to prove the place of the defendant's domicil at the time this suit was brought, or at the time of granting the letter of administration to the plaintiff on the estate of his intestate by the general declaration of the defendant, as a witness, as to what was his intention, at the time specified, in respect to changing his residence or domicil;—and also upon the further ground that the witness was precluded by statute (G. S., p. 327, § 24,) from testifying in his own favor, except as to acts and contracts done or made since the appointment of the plaintiff as administrator on the 30th of October, 1861. But the court overruled the objection, and the witness was allowed to testify, and did testify, in answer to said question as follows, viz: "I never had any thought or intention of changing my residence at all; I was there merely as a boarder." To the ruling of the court permitting the witness to testify in answer to said question, and to the testimony as given by the witness in answer thereto, the plaintiff excepted.

The defendant, in his direct examination as a witness was also asked the following question, viz: "Where have you paid taxes on your personal property?" This question was objected to by the plaintiff, but the objection was overruled by the court, and the wit-

ness replied in answer to the question as follows, viz: "Never in any place but Hampton." To the ruling of the court by which the said question was allowed to be put, and to the testimony of the witness in reply thereto, the plaintiff excepted.

Ziba Rayder, a witness called on behalf of the defendant testified that the defendant told him, Rayder, in 1850, that he (the defendant) was making it his home in one Farwell's family in Hampton. The plaintiff objected to this testimony but the objection was overruled, and the defendant excepted.

Verdict for the defendant. Exceptions by the plaintiff.

H. G. Wood and *Dewey & Joyce*, for the plaintiff.

The ruling of the court excluding the testimony offered by the plaintiff to show that the defendant had continued to reside and have his domicil in Fairhaven down to the time of trial was clearly erroneous. 1 Green on Ev., § 53; *Commonwealth* v. *Turner*, 3 Met. 19.

In a question of domicil evidence of the party's *conduct*, afterwards, as well as before, may be received to ascertain his intention on a particular day. *Richmond* v. *Vassalborough*, 5 Greenl. 376; 17 Pick. 231; *Barton* v. *Irasburgh*, 33 Vt. 159; *Jamaica* v. *Townshend*, 19 Vt. 267; 1 Greenl. on Ev., § 108; American Law Reg., March, 1864. The question of domicil is one of *fact* and *intent*, and they must both concur. The defendant should have been permitted to testify only to such acts as have been done since the appointment of the plaintiff as administrator. G. S., 327, § 24.

E. Edgerton, for the defendant.

The *intention* of the defendant, on the question of his domicil, was properly admitted in evidence. *Barton* v. *Irasburgh*, 33 Vt. 161; Story's Conflict of Laws, § 44.

And so was the place of his personal grand list and payment of taxes. American Law Register for March, 1864, p. 263; *West Boylston* v. *Sterling*, 17 Pick. 128; *Lyman* v. *Fiske*, 17 Pick. 234.

The declarations of the defendant to the witness Rayder, were admissible on the question of intention. *Harvard College* v. *Gore*, 5 Pick. 374.

POLAND, Ch. J. The defendant claimed at the trial that he was a resident of the state of New York at the time administration was granted in this state to the plaintiff on the estate of Silas J. Hulett,

and continued a resident there until after this suit was brought, so that if there was any debt due from him to the intestate, it was assets in that state, and could only be recovered by an administrator there, and not by the plaintiff.

The plaintiff was appointed administrator October 30th, 1861, and commenced this suit February 17th, 1862.

It seems to have been conceded that about the 1st of April, 1861, the defendant commenced boarding with one Wood in Fairhaven in this state, and continued to board at the same place until after the commencement of this suit. The defendant claimed that his stay in Fairhaven was temporary merely, with no design to make that place his home or permanent residence; that he considered his residence or home all the while to be in Hampton, in New York, that his property and business were there, that he exercised his right as a citizen there, by voting at public elections, and performed the obligations of citizenship and residence there, by paying taxes upon personal property, which by ordinary legal rules follows the legal residence of the owner.

The whole question turned upon the character of the defendant's stay or abode in Fairhaven. Was it temporary merely as the defendant claimed? or was it permanent, with a purpose and intent to make that his residence or home, as was claimed by the plaintiff?

The plaintiff for the purpose of showing that when the defendant came to Fairhaven in the spring of 1861, he intended to take up his permanent abode there, and to make that his permanent home or domicil, offered to prove that he had continued to reside or board there down to the time of the trial in March, 1864. This evidence on the defendant's objection was excluded. If the only proper effect of this evidence was to show that the defendant had a residence or was domiciled in this state after the suit was brought, it was properly excluded, because that was not the question in issue, and if the fact was conceded, it would not aid the plaintiff to recover, if his previous domicil was in the state of New York.

But the plaintiff claims that this evidence was admissible, as tending to show the defendant's intent when he came there in the spring of 1861, and during all the period of his stay there, up to the time of bringing the suit. And we are all of opinion that the evidence

should have been received and submitted to the jury for that purpose. In determining the character of a person's residence in a particular place, and with what intent such residence began, its duration is a most important element, and has always been so considered in all the cases upon this subject. One may take up his residence in a place and have a fixed residence or domicil while he remains, though it be but for a very short period of time, even for a single day.

On the other hand one may remain for a long time in a place without having it become his domicil, and be all the while a mere temporary sojourn. But where one's stay in a place is short, and then he returns to his former home, it affords some presumption or evidence that he went there for a temporary purpose, with no intent to remain, while if his stay or residence is protracted, and long continued, it furnishes a corresponding presumption that he designed to remain from the beginning. Other facts and evidence may overcome the presumption in either case, and show that the short stay was of a legally permanent character, and that the longer one was but a mere absence from home, working no legal change of residence. But this by no means prevents the permanence and duration of the stay from being admissible and important evidence on the question. Whenever the intent or mental purpose of a person becomes a question to be proved, his acts and conduct are admissible evidence, and often the best and only evidence of it, and his acts and conduct subsequent to the point of time when such intent is to be shown, are more satisfactory than those which precede or co-exist with it.

This defendant was allowed to testify as to his design and intent in coming to Fairhaven, that it was for a temporary purpose, with no design to remain and make that his home.

This was objected to on the ground that a party should not be allowed to swear to his intent or mental purpose, because it is not in the power of the other party to contradict him by similar evidence.

Of course the workings and purposes of the mind and will of a person are not known by mere consciousness to any one but the person himself, but still, where a person's intent in a particular transaction is a question in issue to be tried, we see no ground on which he can be excluded from testifying to his intent. He can be contra-

dicted only by his acts and conduct or declarations. But where a party swears to his intent, if his acts and conduct are shown to be wholly at variance and inconsistent with the intent he swears to, his own testimony in his own favor would ordinarily obtain very little credit with the jury; and but little danger need be apprehended from such testimony unless his acts and conduct are consistent with it. But the plaintiff objected to the defendant's being allowed to testify on the ground that he was not a competent witness at all, to any fact which transpired prior to the plaintiff's appointment as administrator.

At the time this case was tried we think the defendant was not a competent witness to any fact prior to the appointment of the plaintiff as administrator. Sec. 24, chap. 36, G. S., 327, was evidently designed to exclude one party from testifying, when the other party had deceased, and was represented by an executor, with some exceptions, none of which cover the case of the defendant's admission here, so that he was erroneously admitted.

But by the act of November 22d, 1864, the defendant is made a competent witness, as this action was pending on the first day of August, 1863, and the defendant claims that if he was erroneously admitted to testify, the court should not reverse the judgment and grant a new trial for such error, because he would be a witness on another trial.

This hardly seems a sufficient answer, because the plaintiff might have been surprised by his being admitted, and might have failed to meet or contradict his evidence at the trial for that reason. But we have no need to say whether this alone would induce us to grant a new trial.

The plaintiff objected to the defendant's being allowed to testify that he had paid taxes on his personal property in Hampton, N. Y. It does not appear from the exceptions what this personal property was, or where it was situated. If the property was in this state in the possession of the defendant, as money or debts or stocks that had no visible locality, it would be quite a cogent circumstance that the defendant regarded his legal residence in Hampton. If it was visible personalty, like horses, cattle or carriages, and situated in New York, it might be taxable there though the defendant's

residence was in this state. That would depend on the law of that state, of which nothing appears in the case. In some states the general rule of law that personal property has no *situs*, and follows that of the owner, is regarded in their law of taxation, in others it is not, and all property in the state, both real and personal, is made subject to taxation, wherever the owner resides. But in the absence of any evidence as to the law of New York on the subject, we think it was admissible to show that the defendant paid taxes on his personal estate there, as an act of his which had a tendency to show that he considered that his legal residence. If the law of New York was such, or this property was of such a character, or so situated, as to make that fact of no importance, it should have been shown by the plaintiff as an answer to this evidence. The testimony of Rayder seems to have been wholly immaterial. It tended to show that the defendant's residence was in Hampton at a time when the plaintiff conceded that was his residence, and the plaintiff can hardly complain that the defendant was permitted to prove a fact which he conceded to be true, even if it was immaterial, as we cannot see it prejudiced him.

Judgment reversed and case remanded.

HYDEVILLE COMPANY *v.* WILLIAM F. BARNES.

Book Account. Partnership.

Under the act of 1852, (§ 18, p. 344, G. S.), courts have no power to settle general and extensive partnership dealings in book actions.

BOOK ACCOUNT. The auditors reported as follows: On the 19th of May, 1859, the plaintiff submitted to the defendant the following proposition in writing:

"HYDEVILLE, May 19th, 1859.

W. F. BARNES, Esq.,—*Dear Sir*:—We have concluded to lease you the working of our Pratt quarry for a term of years, say three or five, as we have talked. You shall take the quarry and tools as

they now are, and keep and return the same at the end of the time agreed on in as good order, and the quarry in as good condition to quarry from as it now is. You may call on Moses Humphrey to make a schedule of the tools and property that we may attach it to the contract. We will advance you on all the No. 1 and 2 blocks, ten cents per foot, if it cost so much to quarry them, in our notes at four months at the bank, on the tenth of each month, for all estimated on the first of the month and delivered on the cars, and charge an equal amount for sawing to that advanced. All other expenses after they leave the quarry to be charged in account against said stock, and when sold by our agent, to be employed for that purpose, the nett proceeds are to be equally divided, after paying all advances, and expenses to agents, &c. Should there be any sound marble quarried that the Hydeville Company refuse to advance on, and the said Barnes insists on having sawed, he has the right to send it, which stock is to be sawed on the same conditions as above, except the advances. The Hydeville Company further agree to advance a sum not exceeding one thousand dollars as above, if it should cost so much previous to furnishing their mill with stock, to be laid out on the quarry and be drawn for, one-half the first month as above, all of which shall be applied on the estimates within six months from the working of said quarry. It is further proposed that no more than ten thousand feet shall be estimated per month unless agreed to by the parties, and also the one hundred dollars yearly rent to be paid Pratt shall be paid equally by the parties, no charge to be made for use of tools now on the quarry.

Respectfully, The Hydeville Company,
By A. W. Hyde."

The proposal was accepted verbally by the defendant.

The plaintiffs' claims in the statements presented to the auditors, consisted of marble, and notes and advances made for working said quarry, in pursuance of the terms of the written proposition.

The said parties never had any accounting or settlement in any of the branches of this business, indicated by the statements of account presented, up to the hearing, but the whole, disbursements and proceeds, remained open and unsettled.

It further appeared that there is a large amount of the avails of the working of said Pratt quarry in notes and accounts still due the plaintiff and the defendant, and some property on hand unsold, which has not been divided or distributed between said parties; but remains the joint property of the plaintiffs and defendant.

The auditors decided that the accounts contained in these several statements presented, were matters of partnership accounting, and upon that ground were excluded from their consideration in this form of action, with the exception of items of private account to the amount of $159.92. which was found due from the defendant to the plaintiffs to balance book account between them.

The plaintiffs excepted to the report on the ground of the auditors' exclusion of the partnership accounts from their consideration.

The cause was heard at the September Term, 1864, KELLOGG, J., presiding, on the said report and exceptions; and, on the hearing, the court, *pro forma*, overruled the plaintiffs' said exceptions, and rendered judgment in favor of the plaintiffs on said report for $159.92. damages. To this decision and judgment the plaintiffs excepted.

E. Edgerton and *Dewey & Joyce*, for the plaintiffs.

There are three items which are conceded to be proper to be adjusted in the action of book account. These items are sufficient to give the court jurisdiction of the whole account between the parties. G. S., ch. 41, § 18, p. 344; *Green & Roberts* v. *Chapman*, 27 Vt. 236; *Duryea* v. *Whitcomb*, 31 Vt. 395. The act should be so construed as to effectuate the intention of the legislature, *i. e.*, to avoid multiplicity of suits.

The form of the action is as well adapted to try and adjust partnership deal as the action of account.

The charges made by the Hydeville Company for the advance of money for the working of the quarry, are properly items of book account. They are items of private deal.

Prout & Dunton, for the defendant.

The company portion of this account cannot be recovered in this action. The partnership debts had not been collected or the company property converted into money. Under such circumstances, either a bill in chancery, account at common law, or account under

the act of 1852, (No. 10,) is the appropriate remedy. Chitty on Pl., vol. 1, p. 39; *Green & Roberts* v. *Chapman et al.*, 27 Vt. 239; *Spear & Carlton* v. *Newell*, 13 Vt. 288; *Judd et al.* v. *Wilson*, 6 Vt. 185; *Albee* v. *Fairbanks*, 10 Vt. 314; *Warren* v. *Wheelock*, 21 Vt. 323.

The action of book account brought for the purpose of closing a general partnership account, is not the appropriate action for that purpose. Acts of 1852, Nos. 10 and 11.

PIERPOINT, J. The first question to be considered is whether the co-partnership business of these parties, in the quarrying, manufacture and sale of marble, can legally be adjusted and settled in the action of book account.

By the act of 1852, § 18, p. 344, G. S., it was provided that "whenever on the trial of any action on book account, it shall appear to the court that any item or items of account, or deal, between the same parties, more properly belongs to the action of account, the same may be tried and adjusted in the action of book account."

It is claimed by the plaintiff that this act is sufficient to authorize the court to adjust and settle the account in question in this action; but we think it was not the intention of the legislature to give to courts the power to settle general and extensive partnership dealings in this way. This we think is clearly indicated by the language of the act itself. The terms, "any item or items of account or deal," seem to indicate that the legislature had in mind those single and simple transactions that ordinarily occur between men, growing out of the joint ownership or occupation of property, or where they have such a joint interest in the transactions, that the action of account would be the proper one in which to settle them by legal proceeding, but where from the nature and limited extent of the business, it could be as well settled in the action of book account, and thus save the expense of another suit. It is in the experience of every lawyer that in the adjustment of accounts in the action on book, before this statute, that items were encountered that had to be thrown out, because they could be adjusted only in the action of account, but which all could see might just as well be settled in the

book action, so far as the interests of the parties were concerned; and it was, undoubtedly, to obviate this difficulty that the statute was passed, and not for the purpose of having extensive and complicated partnership transactions settled in this form of action.

The power of the courts in actions on book are wholly inadequate to the settlement of such extensive and complicated co-partnership matters, and in the action of account, it has always been held that such action would not lie to settle co-partnership accounts where there were more than two co-partners, and even in such cases the court of chancery was ordinarily resorted to in consequence of the limited power of the common law courts.

When the legislature by a recent act provided that all co-partnership accounts, irrespective of the number of co-partners, might be settled and adjusted in the action of account, they found it necessary also to provide that in such action, when brought for such a purpose, the common law courts should have full chancery powers. But the legislature has not given such power to the court in actions of book account, although the act we are now considering was passed at the same session with the act last above referred to; thus showing quite clearly that the legislature did not understand that by the act in question they were giving the courts power to settle general and extensive co-partnership dealings in the action of book account.

The plaintiffs further insist that the advances made by them according to the terms of the contract, constitute a private claim against the defendant, and should have been allowed and adjusted in this action. No question of this kind appears to have been made in the county court. The only exception filed to the auditors' report was, that the "auditors excluded from their consideration the co-partnership accounts"; but as the question has been raised and discussed here, and as we are entirely unanimous in our views as to it, perhaps it is not improper that we should express them.

We think it perfectly clear that it was not the understanding of the parties that the advances to be made by the plaintiffs were to constitute a private individual claim against the defendant, that could be sued for and collected of him, independent of the co-partnership

business, and before that was settled and adjusted; because, by the express terms of the contract, the plaintiffs were to be reimbursed for such advances, out of the proceeds of the business. Whether that will be sufficient or not, is a question that can only be determined by a settlement of the copartnership affairs. It is like one co-partner putting into the concern more than his proportion of the capital to be taken out before a division.

Judgment of the county court is affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF BENNINGTON,

AT THE

FEBRUARY TERM, 1865.

PRESENT:

HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

T. W. PARK *v.* THOMAS MCDANIELS.

Promissory Note. Trover. Pleading. Damages.

The plaintiff gave the note in question for accommodation to the defendant, who was to pay and take care of it, and save the defendant from liability upon it. The defendant paid and took up the note after having used it for the purpose designed, and then claimed to hold it as a valid instrument still in force against the plaintiff, and refused to give it up on demand. *Held*, that in the character thus assumed for the note by the defendant, the plaintiff had a right to it and might maintain trover for it.

The defendant could not, by giving up the note after this suit had been brought, defeat rights and avoid liabilities which existed at the time of bringing the suit.

The plaintiff might also recover in the same action, under special averments, for the actual damages which he sustained as a result of the defendant's conduct,

(exclusive of the expenses of this suit, beyond the taxable costs, which could not be embraced as such damages and recovered in this action;) and in the absence of such averments, the case having been referred, it is held that said damages may be allowed the same as though a special count in case had been inserted in, or added by amendment to, the declaration.

TROVER for a promissory note. The case was referred and the referee reported that on the 29th day of January, 1852, the plaintiff executed to the defendant a promissory note for the sum of $2000., payable to the order of the defendant, at the Adams Bank, three months after date. The note was given for the sole accommodation of the defendant, and to be paid and taken care of by the defendant. The note was discounted by the bank for the defendant, and was afterwards paid and taken care of by him; but of this, the plaintiff had no knowledge. Sometime in the fall of 1859 the defendant claimed of the plaintiff that the plaintiff was indebted to him upon the note for its amount and that he then held the note against the plaintiff. On the 12th day of November, 1859, the plaintiff demanded the note of the defendant, but the defendant insisted upon the plaintiff's indebtedness thereon to him, and refused to deliver up the note. On the hearing before the referee the defendant produced and delivered up the note to the plaintiff. The plaintiff upon bringing this action, he then residing in California, employed two attorneys as counsel in this case, who ever since have been in the case, and upon the hearing claimed to recover in addition to damages for not delivering up the note, the counsel fees in this case. The referee submitted to the court the question—1st, whether the plaintiff upon the foregoing facts, is entitled to recover. 2d, If entitled to recover of the defendant, whether counsel fees can form any part of the damages.

The referee reported that the plaintiff sustained an actual damage of ten dollars in ascertaining the character of the defendant's claim upon him and in demanding the note in the fall of 1859 before this suit was brought.

If the plaintiff is entitled to recover of the defendant for not delivering up the note, then inasmuch as it was delivered up to the plaintiff on the hearing the referee only finds for the plaintiff to recover for that, the sum of ten dollars, but if counsel fees in the cause can be regarded as damages, then he finds therefor the addi-

tional sum in damages, for the plaintiff to recover, of one hundred dollars.

The defendant excepted to the report of the referee, because:— *First*, The plaintiff is not entitled to recover anything whatever. *Second*, If entitled to recover, the recovery should be restricted to nominal damages merely. *Third*, The plaintiff is not entitled to recover as damages, counsel fees in this suit.

The court at the June Term, 1864, KELLOGG, J., presiding, decided, *pro forma*, that upon the report of the referee and the exceptions thereto, the plaintiff was entitled to recover for the largest sum reported by the referee, and rendered judgment accordingly,— to which decision and judgment the defendant excepted.

G. W. Harmon, for the defendant, maintained that the defendant's conduct in claiming that the plaintiff owed the note affords no ground for maintaining *trover*. The remedy, if any, in such case, is *case*, or by a resort to *equity*. *Todd* v. *Crookshanks*, 3 Johns. 632; *Murray* v. *Burling*, 10 Johns. 172; *Buck* v. *Kent*, 3 Vt. 99; *Pierce* v. *Gilson*, 9 Vt. 216; *Decker* v. *Matthews*, 12 N. Y. 313. The utmost that the plaintiff can recover, is nominal damages. *R. & W. R. R. Co.* v. *Bank of Middlebury*, 32 Vt. 639. Counsel fees in this suit cannot be recovered. S. C., 32 Vt. 639.

———, for the plaintiff.

BARRETT, J. This is in form, an action of trover. The case was referred under a rule of court, and the referee has reported all the facts. It is well settled, that if the report shows a case upon which the plaintiff has a right of recovery under any amendment of the declaration that might lawfully be made, the court will render such a judgment as, under a proper declaration, the plaintiff would be entitled to. It is plain, in this case, that it would have been lawful to permit an amendment, by adding a count in case, setting forth the special facts, embracing as the *gravamen* the wrongful conduct of the defendant in setting up the note as valid, constituting a debt owing by the plaintiff to himself, and thus putting the plaintiff in peril, and rendering it necessary for him to take measures to protect himself, and therein incurring expense.

We make these remarks in view of an aspect of the case which will be mentioned hereafter.

If this note had been given by the plaintiff to the defendant as evidence of a debt due to the defendant, and the plaintiff had paid the same, the plaintiff would have been entitled to it as his own property; and a refusal to deliver it to him on reasonable demand, and under proper circumstances, would have given a right of action in trover. But such was not this case. The plaintiff had given the note for accommodation to the defendant, who was to pay and take care of it, and save the plaintiff from liability upon it. The defendant had paid and taken it up, after having used it for the purpose designed. The plaintiff was *then* under no further liability. The note was *functus officio*. If the plaintiff had then had some proper instrument from the defendant conclusively operating to show that the note had become invalid as against the plaintiff, he would have had no interest in the note, and it might be said he had no property in it. It would seem that the only right the plaintiff had in respect to the note after it had been paid, was, to have his name stricken out, or an endorsement made upon it showing that its validity was at an end. If either of these things had been done, it is difficult to see why the defendant might not properly have retained the note, or on what ground the plaintiff could have insisted that the note was his as a piece of property. If the plaintiff can be said to have any right in the note as property, it is because the defendant set it up and claimed to hold it as a valid instrument still in force against the plaintiff. In the character thus assumed for it, the defendant had no right to it, and the plaintiff had.

It was not permissible for the defendant to repudiate such character, thus given by him to the note, after this suit had been brought, and thereby defeat rights and avoid liabilities which existed at the time of bringing the suit. At that time, in the character given to the note by the defendant, the plaintiff was entitled to it, and the defendant refused to give it up on demand, and his insisting on having it paid to him by the plaintiff constituted a conversion, for which trover might be maintained; and, if only the question of nominal damages was involved, we should have no difficulty with the case under the declaration in trover. But the referee has found that the plaintiff has sustained ten dollars actual damages, as the result of the defendant's conduct, but this does not enter into, or constitute the

value of the note as a piece of property. The general rule is, that the measure of *actual* damage in trover, is the value of the property, or the extent of injury done to it. Damage outside of this ordinarily can only be recovered by special action on the case, or by special averments in the declaration. For the purpose of avoiding embarrassment in this aspect of the case, we are led to put it upon the same ground as if a special count in case had been inserted in, or added by amendment to, the declaration. Under such a count we have no doubt of the plaintiff's right to recover the actual damage caused to him by the defendant's wrongful conduct in respect to the note.

The expenses of this suit, beyond the taxable costs, cannot be embraced as such damage. They are not of that character of special damage resulting as a consequence of the defendant's wrongful act, as to constitute a ground of recovery in the action itself.

Judgment is reversed, and judgment rendered for the plaintiff for ten dollars damages, and his costs in the county court.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF WINDHAM,

AT THE

FEBRUARY TERM, 1865.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. JOHN PIERPOINT,
HON. LOYAL C. KELLOGG,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

ABIAL RICHARDSON, *Administrator of* THOMAS RICHARDSON, *v.* BARNA A. COOK AND CAROLINE RICHARDSON, *Executors of* WARREN B. RICHARDSON.

Statute of Limitations. Contract. Constitutional Law.

The statute, § 25, ch. 63, G. S., providing, that "no acknowledgment or promise shall be held to affect any defence made under the provisions of this chapter," (relative to limitations of actions), "unless such acknowledgement or promise shall be in writing signed by the party affected thereby," held to be prospective, and not retrospective, in its action, therefore not applicable to a case pending when said statute took effect.

Richardson, Adm'r, *v.* Cook et al., Ex'rs.

Laws that change and modify remedies, forms of proceedings, or the tribunal itself, are recognized as valid, provided they do not directly, or indirectly, destroy or abolish all remedy whatever by which the performance of any class of valid legal contracts may be enforced.—POLAND, Ch. J.

APPEAL from the probate court. The declaration contained only the common counts in *indebitatus assumpsit* demanding $2000. Pleas, the general issue, and the statute of limitations. The pleadings resulted in a demurrer to the rejoinder. The question presented upon the pleadings is whether upon the trial of the issue "*non assumpsit infro sex annos*" in a suit pending at the time the General Statutes of 1863 took effect, an acknowledgement or promise not in writing is sufficient to take the case out of the statute of limitations.

The court, at the September Term, 1864, BARRETT, J., presiding, adjudged the rejoinder insufficient and rendered judgment for the plaintiff for $908. and costs,—to which the defendant excepted.

H. E. Stoughton, for the defendant, maintained that the statute under consideration may be retrospective in its operations, still it is not *ex post facto*, nor does it impair the obligation of contracts. *Forbes* v. *Smith et al.*, 1 Tyler 38; *Bell* v. *Roberts*, 13 Vt. 582; *Brown* v. *Storm*, 4 Vt. 37; *Lowry* v. *Keyes*, 14 Vt. 66; *Wires & Peck* v. *Farr*, 25 Vt. 41; *Briggs* v. *Hubbard*, 19 Vt. 86; *Raymond* v. *Southerland*, 3 Vt. 506; *Foster et al.* v. *The Essex Bank*, 16 Mass. 245; *Locke* v. *Dane et al.*, 9 Mass. 361; *Patterson* v. *Philbrook et al.*, 9 *Ib.* 151; *West* v. *West*, 2 Mass. 223; *Bickford* v. *Boston & Lowell R. R. Co.*, 21 Pick. 109; *Abner B. Lane, apt.*, 3 Met. 213; *Wright* v. *Oakley et al.*, 5 Met 400; *Willard* v. *Clark*, 7 Met. 435; *Brigham* v. *Bigelow*, 12 Wheaton, 268; *Colder and Wife* v. *Bull and Wife*, 3 Dallas, 386; *Sturgiss* v. *Crowningshield*, 4 Dallas, 206; *Mason* v. *Haile*, 12 Wheaton, 370; 19 Pick. 578; *Decouche* v. *Savetier*, 3 Johns. Ch. 190. The defendant had no *vested* right to prove by parol the promise made prior to the time when the General Statutes went into operation requiring proof of such promise to be in writing. *See cases cited above.* Angell on Limitations, p. 298–9 and 18; Story on Conflict of Laws, §§ 578, 580; *Ansel* v. *Ansel*, 14 C. L. R. 716; *Fowler* v. *Chatterton*, 19 E. C. L. 123; *Hillard* v. *Lenard*, 22 E. C. L. 313; *Hayden* v. *Williams*, 20 E. C. L. 81. The

act is not even retrospective in its operations, it is prospective and simply relates to the time of trial. *See cases cited above.*

Charles N. Davenport, for the plaintiff.

Section 25 of chap. 63, G. S., does not apply to or affect any suit pending at the time of its enactment. Session Laws of 1864, No. 32, p. 49; § 3 ch. 130, p. 766, G. S.

It is obvious that the plaintiff had an existing right of action at the time he brought his suit. It was a right vested under prior existing statutes. And the legislature had no constitutional power to pass a statute which would operate retrospectively to take away this vested right. *Wright* v. *Oakley*, 5 Met. 400; *Bates* v. *Kimball Adm'r*, 2 D. Chip. 77; *Dupy q. t.* v. *Wickwire*, 1 D. Chip. 237; *Staniford* v. *Barry Adm'r*, 1 Aik. 321; *Ward* v. *Barnard*, 1 Aik. 121; *Hill et al.* v. *Sunderland*, 3 Vt. 507; *Dash* v. *Van Kleeck*, 7 Johns. 477; *Gilmore* v. *Streeter*, 2 Mod. 310; *Couch* v. *Jeffries*, 4 Barr. 2460; Angell on Lim. 18, *et seq.*

POLAND, Ch. J. This action was pending when the General Statutes came into force as laws, on the first day of August, 1863.

The defendants by the pleadings concede, that their testator within six years before his decease, made such a verbal new promise to the plaintiff's intestate, to pay his debt to him, that by the then existing law the debt was in full force as an existing legal obligation, and an adequate legal remedy also existed by which its payment might be enforced. At the time when the pleadings were filed, and when the cause was heard and decided in the county court, the General Statutes were in force, § 25 of chap. 63 providing, that "no acknowledgment or promise shall be held to affect any defence made under the provisions of this chapter, unless such acknowledgment or promise shall be in writing, signed by the party affected thereby."

The defendants claim, that although their testator's promise when made, bound him to the payment of the debt, and when the plaintiff brought this action, he had a legal cause of action and right to recover; still that as the above quoted section of the General Statutes came into force before the time of trial, the case is governed by it, and the testator's promise cannot be proved and made available to avoid the bar of the statute of limitations, because not in writing. It is not denied but that this application of the statute to the case,

has the effect to deprive the plaintiff of any legal right or power to enforce the performance of what was a legal, valid obligation at the time this suit was brought; but it is said, that this statute is one affecting the *remedy* merely, and not the *right;* that it is merely establishing a different rule of evidence, by which new promises to take debts out of the statute of limitations shall be proved; and that as it is agreed that the legislature have the undoubted power to alter and modify the forms of proceedings in legal tribunals, and vary rules of evidence, even in reference to existing causes of action and suits pending, therefore no valid objection exists to applying this new section of the General Statutes to the plaintiff's case; that if it works an injury to the plaintiff, and deprives him of what was before a good ground of action, it is only one of those exceptional, incidental misfortunes, attendant upon all changes in the forms of remedies, and the course of legal proceedings, and does not prove that the legislature might not properly make such change in the law.

The plaintiff insists that if this section of the General Statutes is given a retrospective action, so as to apply to all verbal promises made before the act came in force, it is to that extent unconstitutional and void, as being a law "impairing the obligation of contracts," which the several states are prohibited from passing, by the constitution of the United States.

The "obligation of a contract," within the meaning of the constitution, is not merely the *moral obligation* of the party who has received the consideration, and is therefore equitably bound to perform the agreement on his part, but it is the *legal obligation*, which embraces not only the *right* of the party entitled to performance, but the power by law to enforce and consummate that right, by compelling that performance. It is this legal obligation,—this right to enforce, and make effectual by legal compulsion, in the case of unexecuted contracts, which the state legislatures are forbidden to impair. See Story's Com. on Constitution, vol. 3, p. 241, §§ 1370 to 1376.

It has been repeatedly said by courts in pronounced judgments, and by writers on the constitution, that this prohibition in the constitution does not apply to statutes relating to remedies, and that therefore it is no objection to a remedial statute, that it is retro-

spective in its operation. With the qualification, that such statutes shall not be allowed to impair the obligation of contracts, or disturb absolute vested rights, the doctrine is free from objection.

It is clearly within the legislative power of the state to make such changes and alterations in the forms and modes of administering justice by its tribunals, as they may deem most conducive to the general welfare; but when under the guise of changing or modifying the remedy, or changing a rule of evidence, all remedy whatever is taken away for the enforcement of any class of valid contracts, such legislation ventures across the prohibited constitutional boundary, and is so far invalid.

There appears to be a great deal of loose and indefinite language in the cases upon this subject, and hardly entire harmony in the decisions themselves. Some of the language used would seem to go far enough to hold, that if the statute was only one in relation to the remedy, it was not open to constitutional objection, though it took away all remedy whatever.

But we think that the result of all the discussions and decisions is, that such laws are valid, with the qualification above stated, that they do not impair the obligation of contracts, or disturb absolute vested rights; or in other words that the legislature may change and modify remedies, forms of proceedings, or the tribunal itself, as they choose, but they shall not directly, or indirectly, destroy or abolish all remedy whatever, by which the performance of any class of valid, legal contracts may be enforced.

Among the subjects of legislation which have generally been classed as pertaining to the remedy, and not to the right, is the statute of limitations. That this is so far true, that the legislature might shorten, or lengthen, the period of the statute as to contracts already existing, cannot be successfully denied. But is it equally clear that the legislature might shorten the period of the statute as to existing debts, so that the creditor should have no opportunity at all to enforce the debt, and so that his debt would be barred the moment the statute was passed? If the legislature were to pass a law providing that no action whatever should be brought or maintained upon any promissory note heretofore given, no one would question but that such act would be unconstitutional and void.

If the legislature were to enact that no action shall be brought or maintained upon any promissory note heretofore given, except within one year from the date of such note, could it be claimed that such law was valid and binding as to all notes within its terms? It seems to me the same difficulty in principle exists as in the case of a prohibition of suits on all notes.

And so as applied to the present case, the plaintiff had at the time this section of the General Statutes was passed, a valid, subsisting legal contract against the defendants, which the law furnished an adequate and effectual remedy to enforce, but by this section, if it applies to the case, all right and remedy to enforce that contract is absolutely taken away, and so of all the numerous class of cases standing like the plaintiff's.

It seems to me that the same constitutional difficulty underlies this act, when applied to previous verbal promises, as would an act prohibiting any action on a note previously executed.

But we are relieved from going into any extensive examination of this constitutional question, or from making any decision upon it, for we are all agreed that this section of the statute does not apply to parol promises made before this section came in force.

In this country retrospective legislation has never been favored. The contracts of parties are made, and the conduct and acts of the people regulated, by the law existing at the time, and any subsequent change in the law by which any different effect, or consequence, is attached to such previous contracts or acts, is always productive of more or less injustice; so that irrespective of the constitutional inhibitions against *ex post facto* laws, and laws impairing the obligation of contracts, (but still somewhat in analogy to, and harmony with them,) such subsequent legislation will be presumed to have been intended by the legislature to be *prospective*, and not *retrospective*, in its action.

In *Briggs* v. *Hubbard*, 19 Vt. 86, the principle is thus stated by the court: "It is an elementary principle, that all laws are to commence *in futuro*, and operate *prospectively*; and no one can question the correctness of the position as a general rule, that no statute is to be so construed, as to have a retrospective operation beyond the

time of its enactment, unless the language is too explicit to admit of any other construction."

See also to the same effect, 1 Kent's Com. 455, 456 and notes, 8th ed. This principle has been repeatedly acted upon and applied in this court. In the above case of *Briggs* v. *Hubbard*, which was a petition to vacate a judgment by default, rendered by a justice of the peace, and for a new trial, the statute in force at the time such judgment was recovered, provided that a petition to vacate, &c., should be brought to the first, or second term of the county court, after the rendition of such judgment. Subsequently the legislature passed an act providing that such petition should be commenced within two years. The plaintiff's petition was brought after the passage of the latter act, and was within two years after the rendition of the justice's judgment, but it was not within the act in force at the time.

The court dismissed the petition, and held that the statute was intended by the legislature to have a prospective operation only, as a different operation might work wrong and injustice, and disturb rights acquired under the former statute.

In *Lowry* v. *Keyes*, 14 Vt. 66, it was decided that the act of 1832, which provided that, "if any person shall go from this state before the cause of action shall be barred, the time of such absence shall not be reckoned in determining the time within which such cause of action shall be barred," was not intended to operate upon causes of action already barred by the operation of the previous statute.

And in *Wires & Peck* v. *Farr*, 25 Vt. 41, the court went farther, and held that the act of 1832 had no retrospective action whatever, and that the defendants in making out the statute bar, was entitled to have reckoned all the time after the cause of action accrued prior to the passage of the act of 1832, although he was out of the state.

It was not questioned in these cases but that it was within the constitutional power of the legislature to have made the act apply to all existing causes of action, as a debtor cannot properly be said to have a vested right to a mere statutory defence; but the court said that although the general language of the act was consistent enough with such a construction, they would presume that the legislature did not

intend to disturb any defence acquired, either totally, or partially, under the former statute.

So in *Wright* v. *Oakley et al.*, 5 Met. 400, a decision was made to the same effect as in our case of *Lowry* v. *Keyes*, and the judgment in that case pronounced by Ch. J. SHAW, contains a very full and satisfactory discussion of the principles applicable to statutes, and when they should, or should not, be allowed to operate retrospectively.

The same principle of presuming that the legislature intended a new statute to operate prospectively only, where a retrospective effect would work injustice, and disturb rights acquired under the former law, has been adopted and acted upon in the English courts, although parliament in its legislative powers is unclogged by any constitutional restrictions.

An early and notable example of this class arose under the statute of frauds passed in the 29th of Charles II, which enacted that in several classes of actions on promises, "no action shall be brought, &c., unless such promise be in writing signed by the party, &c." It was "held that parol promises made before the passage of this statute, and valid as the law then stood, were still binding and to be enforced according to the former law." *Gilmore* v. *Streeter*, 2 Mod. 310; same case, 2 Shaw, 17. The principle of these decisions seems exactly applicable to the case in hand.

The defendants rely very strongly upon *Fowler* v. *Chatterton*, 6 Bing. 258, (19 E. C. L. 75), and several other similar English decisions, as governing this case.

The statute of 9 Geo. IV, c. 14, was almost identical in language with the section of our General Statutes which comes in question in this case, and it was decided in *Fowler* v. *Chatterton*, and in several other cases about the same time, that after that statute came in force a parol promise made prior to the statute could not be proved as an answer to the plea of the statute of limitations. The statute was passed on the 9th day of May, but it was provided by another section that it should not take effect until the first day of the following January.

The opinions of the judges are exceedingly meagre of reasons for giving this effect to the statute. The fullest opinion of all is that of

PARK, J., in *Fowler* v. *Chatterton*, and the only reason he gives is based upon the fact that the operation of the statute was postponed for nearly eight months, for the purpose of enabling all persons holding parol promises to enforce them by action, and thus avoid the injustice and hardship which would be occasioned by an immediate operation of the new law.

However satisfactory, or otherwise, this reason may be, it seems to be virtually conceded that if the act had been passed without the provision for delay in taking effect, it would have been entitled to a different construction in this respect.

It may be said that the same reason exists for giving the same construction to this section of our General Statutes; that the General Statutes were enacted by the legislature in the fall of 1862, and did not go into effect until August 1st, 1863. But this delay applied not to this section only, but to the whole body of the laws embraced in the General Statutes; so that it can hardly be supposed that the legislature intended the delay as a warning to creditors whose debts were in legal life by virtue of parol promises of their debtors, that they must bring them into judgment before the first day of the succeeding August.

Another satisfactory answer to any such suggestion in reference to our statute is, that by the settled course of the sessions of our courts, and the rules of practice in them, a litigated suit could not have been commenced and brought to a final trial in the period which elapsed between the passage, and coming into effect, of the General Statutes, showing clearly that the delay could not have been given for any purpose of enabling creditors to avail themselves of such parol promises before the new law took effect.

In justice to the counsel for the defendants, (who has argued the cause with great learning and ability,) it ought to be said, that he has attempted no argument drawn from the fact that this law did not take effect from its passage, and what has been said on that point has been suggested by the reason given by the English judges.

That this statute is eminently one where the principle of prospective effect only should be given, we regard as clear, both on principle and by the authority of previous cases. By the parol new promise the plaintiff's debt was equally valid and as easily enforced as if he

had taken a new note, or an acknowlegment or promise to pay it in writing. He had done all that the law required to make himself secure, and might well omit to do more; he might very naturally have given delay and favor to his debtor, and neglected to collect his debt, relying upon this very promise to pay. Under these circumstances, if the legislature had the power, it would be most manifest injustice for them to interpose a new statute defence, that would enable the defendants, without any fault or laches on the part of the plaintiff, to avoid judgment. It is a clear case, as we think, for presuming that they intended no such unjust effect. If anything were needed to show what the legislature in fact intended, it might be found in the haste with which they gave their construction of this section, after they learned what was claimed for it. See Session Laws of 1864, 49, No. 32.

This view renders it unnecessary for us to examine, or decide on other grounds presented, as to whether, if this section of the statute applied to the case, it would be within the saving act, ch. 130, G. S., or whether the case is affected by the act of 1864.

Judgment affirmed.

Silas M. Waite v. Windham County Mining Company.

Corporations. Usury.

The plaintiff was appointed treasurer of the defendant corporation by the directors thereof pursuant to a provision of the by-laws, all the directors but one being present at the meeting, and nothing appeared but that the absentee was notified of the meeting. The plaintiff entered upon and performed his duties as treasurer for two and one-half years, no question ever having been raised by the absent director, or any stockholder of the company, but that he had been legally appointed. *Held*, that the company cannot refuse payment for his services on the ground that he did not legally hold the office.

It is not necessary that there should be any formal meeting of the directors in order to enable them to do any act which was properly within their power to do.

In business corporations the power to fix the salary of treasurer, is held to be incident to the general power and duty of the office of directors, if not prohibited or otherwise restricted in the charter.

It was agreed between the directors and the plaintiff, that if he would accept the office of treasurer, provide and advance funds for the company to carry on their business, and do the business of the treasurer, he should be paid therefor three hundred dollars per year, and one per cent. a month for money advanced. *Held*, that the contract for interest was usurious.

GENERAL ASSUMPSIT. The case was referred to referees who found and reported the following facts: The defendants are a corporation chartered by the legislature of this state in 1856. The company was organized at Brattleboro on the 6th day of May, 1857, by the choice of directors, and S. M. Waite, the plaintiff, secretary. At a meeting of the directors held on the same day David Heaton, 2d, was chosen president and treasurer. A meeting of the stockholders was duly notified and held at Brattleboro, January 6th, 1858, at which meeting a new board of directors were chosen. This meeting adjourned to January 7th, 1858. At the adjourned meeting S. M. Waite was chosen treasurer, and at the annual meeting on the 5th day of January, 1859, he was again chosen secretary and treasurer, which office he held till the 18th day of June, 1860.

At the adjourned meeting of January 7th, 1858, none but the directors were present; they were all present but one.

At the first meeting of the company, when the plaintiff was chosen secretary, it was understood and agreed by the stockholders and directors, and the plaintiff, that he was to receive a salary of one hundred dollars per year, for performing the duties of the office.

At the adjourned meeting held January 7th, 1858, it was agreed between the plaintiff and those present at that meeting, that if the plaintiff would accept the office of treasurer, provide and advance funds for the company to carry on their business, and do the business of the treasurer, he should be paid therefor three hundred dollars per year, and one per cent. a month for money advanced, and he should not be required to advance at any one time exceeding five thousand dollars, and that his salary as secretary was also to be continued.

If the agreements above referred to are binding upon the parties, then the referees find there is due to the plaintiff, including interest to September 13th, 1864, the sum of $1056.37.

In arriving at this conclusion the referees allowed the plaintiff his

salary as secretary three years one month and twelve days, at one hundred dollars per year, making $311.63., and for services as treasurer from January 7th, 1858, to June 18th, 1860, two years five months and eleven days, at three hundred dollars per year, making $734.17., and the other items of the plaintiff's account as charged. They computed interest at one per cent. a month on money advanced by the plaintiff, and find it to be $359.58. If the plaintiff is entitled to recover the same under the aforesaid agreement, it should be added to the aforesaid sum of $1056.37., making the sum of $1415.95.

If the directors had no authority to fix the salary of the plaintiff, and the plaintiff is entitled to recover only a reasonable compensation for his services actually rendered, then his services as secretary and treasurer were reasonably worth $522.90, and the plaintiff is entitled to recover, including interest, the sum of $373.27. The ability of the defendants to refund the money advanced by the plaintiff, depended mainly upon the success of the company and the value of a soap stone quarry, which was then being experimented upon.

Taking into consideration the risk and inconvenience of furnishing the funds advanced, the plaintiff's services were reasonably worth the sum the directors proposed to pay him, and which the plaintiff expected to receive.

A case between the same parties and pertaining, substantially, to the same subject matter, was heard at the February Term, 1863, and is reported in the 36th Vt., page 18,—to which reference is had for additional statement of facts.

At the September Term, 1864, BARRETT, J., presiding, the court rendered judgment *pro forma* on this report, for the sum of $1415.95, being the largest sum found for the plaintiff by the referees,—to which the defendants excepted.

Washburn & Marsh and *D. Kellogg*, for the defendants.

H. E. Stoughton, for the plaintiff.

POLAND, Ch. J. The plaintiff was appointed treasurer of the company by the directors of the same. All the directors were present at the time except one, and without reckoning the plaintiff, a majority of the board were present and made the appointment. It is not found that the director who was not present was not notified, so that he might have been present if necessary. But we are not

prepared to say that the action of a majority was not legal though one member was not notified. Nor do we deem it necessary there should be any formal meeting of the directors in order to enable them to do any act which was properly within their power to do. The by-laws of the company expressly provide that the treasurer shall be appointed by the directors. The plaintiff entered upon the performance of his duties as treasurer, and no question seems ever to have been raised by the absent director, or any stockholder of the company, but that he had been legally appointed. From this, the assent of the absent director, and of the company, may well be assumed, if that were necessary, and after acquiescing without objection, and allowing him to perform the services and duties of the office, they cannot be permitted to refuse payment for services, on the ground that he did not legally hold the office.

The defendants claim that the directors could not legally contract with the plaintiff as to the amount of his compensation as treasurer. As before said the directors have the power of appointment, and in the absence of any prohibition in the charter or by-laws, on the directors, and of any other person to whom, or mode in which, the salary or compensation of the treasurer is to be determined, we think the power to fix his compensation, or agree with him upon it, belongs to the directors as an incident of the power of appointment, as otherwise they might be wholly unable to fill the office. They might not be able to find any person to accept it, unless he could have his compensation fixed. But we think further, that in the case of a business corporation like this, such a power is incident to the general power and duty of the office, position and duties of directors. They have the general care and oversight of the interests and affairs of their constituent corporation, and may as well agree with the treasurer on the price of his services, as for those of laborers or any other employee of the company.

There is nothing in the report that would justify the conclusion that the price agreed on for the plaintiff's salary as treasurer of the company was intended as a cover for usury, and nothing from which we can say that the contract was not fairly and honestly entered into both by the plaintiff and the directors with whom the contract was made. Nor is there any claim made but that the plaintiff performed

all the duties of treasurer with fidelity, and to the full satisfaction of the company and its officers.

The plaintiff was therefore entitled to his compensation as treasurer, according to the contract price.

No question is made but that the plaintiff was duly appointed the secretary of the company, and that the compensation agreed upon for that office, is binding on the company.

The agreement for the payment of the one per cent. a month upon the moneys advanced by the plaintiff for the company, we consider a direct contract for the payment of a greater rate of interest than is allowed by law, and therefore not binding. It was a direct loan of money by the plaintiff to the company to be repaid at all events. If the contract had been that the plaintiff was to be paid a certain per cent. for endorsing the paper of the company to enable them to raise money to use, such a contract might be good, as a compensation for the risk and responsibility incurred. But this was a direct loan of the plaintiff's own money, and though he might incur risk of losing it by the failure or inability of the company to pay, he could not take an additional rate of interest for such risk. The law will not enable a lender of money to graduate his rate of interest on a loan, according to the risk he runs of the solvency of his debtor. If there had been some contingency upon which the money was advanced, by which the plaintiff might have lost any claim to have his money back, such a contract would have been valid. But this was a direct loan, to be repaid absolutely, and any contract for more than lawful interest upon it was usurious. This claim should have been disallowed.

The judgment is reversed, and judgment rendered for the plaintiff for the sum of $1056.37. and interest since September 13th, 1864. The plaintiff to recover no costs in this court, and the defendants' costs in this court to be deducted.

Royal F. Williams v. Alson L. Wilder.

Usury. Promissory Note. Statute of Limitations.

The defendant was applied to by the plaintiff to loan the plaintiff some money. The defendant finally undertook to raise the money, or get some one to do so, upon the following terms,—the plaintiff was to receive $700., and give a note for $840., secured by a mortgage on his farm, and they agreed upon the time and place of carrying out the transaction. Previously the defendant, unbeknown to the plaintiff, had arranged with one H. to furnish the money and take the note and mortgage; and at the appointed time and place H. met the parties, and the transaction was carried out in that way, though the plaintiff had previously dealt with the defendant alone, for the loan. Soon after this H. paid to the defendant $75., which was paid by H. and received by the defendant, as a part of the transaction of the loan, and in consequence of the bonus of $140. being included in the note. The defendant subsequently purchased the note and mortgage, and the plaintiff paid him the amount of the note including the $140., with the interest thereon. H. acknowledged he had one-half of the extra amount included in the note, and settled with the plaintiff for the share he had received. The plaintiff then brought this action against the defendant for the balance. *Held*, that the defendant was a party to the usurious contract, so as to make him liable to refund so much of the usury paid, as he received, though not named as a party in the security given.

It seems, that had the defendant had no connection with the usurious contract, but been merely an innocent holder of the note while current, the plaintiff could not have resisted payment of the usury; the law being regarded as settled that where the statute merely declares the consideration illegal, without saying the security shall be void, then the security is good in the hands of an innocent holder for value, if taken in due course of business in the mercantile sense.

But had the defendant taken the note with knowledge of the usury, without having had any connection with the contract, the plaintiff might have resisted payment of the usury; but whether he could recover it back when paid, *quere*.

H. paid the defendant the said $75. more than six years before this suit was brought, but the plaintiff made the payment on the note to the defendant within six years. *Held*, that the plaintiff's cause of action arose when the last payment was made.

Assumpsit, in the common counts, to recover back money alleged to have been paid as usury. Pleas, the general issue, and statute of limitations.

The case was referred, and the referee reported that sometime in the fall of 1851, the plaintiff informed the defendant that he wanted to borrow some money, and told him the amount. The defendant then gave some encouragement that he would raise the money for him, but told the plaintiff he would have to pay a little something extra, as he, the defendant, sometimes had to pay extra. In March,

1852, and a short time before the plaintiff wanted to use the money, the plaintiff saw the defendant at Wilmington, and spoke to him again and asked the defendant if he could have the money as they had before talked. The defendant told him he could not raise it so; but after some further conversation the defendant undertook to raise the money, or get some one to do so, on the following terms, viz: The plaintiff owned a farm in Readsboro which was mortgaged to a Mr. Raymond for about six hundred dollars,—the defendant, or the person he should find to furnish the money, was to furnish seven hundred dollars, with which the plaintiff was to pay the mortgage to Raymond and relieve his farm from all incumbrance, and for the seven hundred dollars to execute his note for eight hundred and forty dollars, payable in four years, with interest annually, and give a mortgage on his aforesaid farm as security,—and the parties were to meet at Readsboro to transact the business. Before this arrangement was made, the defendant had seen Frederick G. Hubbard, who had agreed with the defendant to furnish the money, upon the representation that the security was good and sufficient. In accordance with this arrangement the parties met at Readsboro on the third day of April, 1852, the plaintiff supposing that he had negotiated with the defendant alone, for the loan. But Hubbard came with the defendant to Readsboro. When the parties had met there the mortgage of said Raymond was discharged, and all incumbrances were taken off from the plaintiff's farm. Hubbard then produced the seven hundred dollars, and the plaintiff executed his note to Hubbard for the sum of $840., payable in four years, with interest annually. The note was made payable to Hubbard or order, and at the same time the plaintiff executed a mortgage of said farm to secure payment of the note. The farm was ample security for that purpose. The said Hubbard furnished and delivered the money for which the note was given, from his own funds. At the time this arrangement was carried out, or within a few days afterward, Hubbard paid to Wilder, the defendant, seventy-five dollars, which the defendant testified was from the generosity of Hubbard, for seeing to the mortgage.

Both the defendant and Hubbard testified that the defendant had no interest in the loan. But the auditor found that the $75. was

paid by Hubbard and received by Wilder as a part of the transaction of the loan to the plaintiff and by reason of the bonus of $140. included in the note aforesaid. The defendant subsequently purchased the note and mortgage, and on the 31st day of March, 1856, the plaintiff paid to the defendant the amount due on the note, including the said $140., with annual interest thereon. Hubbard was paid the face of the note and interest thereon.

On the same day the writ issued in this case, the plaintiff procured a writ against the defendant and Hubbard jointly, when Hubbard finally admitted that he had one-half of the extra amount included in the note, and the plaintiff settled with him for the share he had received, and Hubbard gave the plaintiff his note for $75. and the plaintiff discharged him, and thereupon brought this suit. If from the foregoing facts the plaintiff is entitled to recover, the $70., being half of the said $140., amounted at annual interest, at the time said note was paid by the plaintiff, to the sum of $88.23, and simple interest on that amount from March 31st, 1856, the date of the payment of the note by the plaintiff, to the first day of the term of the court to which this report is made, amounts to $120.58, which is due the plaintiff, with costs.

On the report, at the Aprill Term, 1864, BARRETT, J., presiding, the court rendered judgment for the plaintiff for the sum found by the referee,—to which the defendant excepted.

Charles N. Davenport, for the defendant.

I. Judgment ought to pass for the defendant, for he has not taken, "directly or indirectly," *of the plaintiff*, any sum "for the forbearance of any other sum, for any time. G. S., 507, § 3. To lay the foundation for an action upon this statute, two facts must exist. *The plaintiff must have paid usurious interest, and the defendant must have received it of the plaintiff.* 2 Parsons on Con., 384–5 and 387; *Floyer* v. *Edwards*, Cowper, 112. The taking of security for usury is not the offence or illegality, but the receiving payment of it. *Thomas* v. *Cleaves*, 7 Mass. 361.

The statute upon which this action is founded reads: "No person shall take, *directly* or *indirectly*, more than the value of six dollars for the forbearance of one hundred dollars for one year, and at the same rate for a greater or less sum, and for a longer or shorter

time." The defendant has not forborne any sum, for any time, directly or indirectly. What the statute means by the terms "directly or indirectly", is this: A man shall not *directly* take more than six per cent. interest, nor shall he *indirectly* by the sale of property at an exorbitant price, or by the transfer of worthless securities, in connection with a loan, be allowed to evade the statute. *Dyer* v. *Lincoln*, 11 Vt. 300; *Austin* v. *Harrington*, 28 Vt. 130; *Floyer* v. *Edwards*, Cowper, 112; *Whipple* v. *Powers*, 7 Vt. 457; 2 Parsons, 385, *et seq.*, and notes.

II. But the statute of limitations affords a shield to the defendant. Whatever usury the defendant received was on or about April 4th, 1852. The writ issued March 25th, 1862. The defendant's relation to the plaintiff after the purchase of Hubbard was precisely that of any other person who might have become the owner of the note and mortgage. The defendant's notice that the note was tainted with usury might possibly have afforded the plaintiff a defence, *pro tanto*, yet if he chose not to defend, but to pay voluntarily, he cannot recover back. If the plaintiff ever had any cause of action against the defendant, it accrued immediately after the payment by Hubbard. *Nelson* v. *Cooley*, 20 Vt. 201.

W. H. Follett and *H. N. Hix*, for the plaintiff.

POLAND, Ch. J. The first inquiry suggested by this case is whether the plaintiff has paid any usurious interest to the defendant, in such manner as to be entitled to maintain an action against him to recover it back. The report shows that in the note the plaintiff gave to Hubbard, there was included one hundred and forty dollars usury; that Hubbard sold and transferred the note to the defendant, and that the ultimate payment of the whole note, both the legal and illegal part, was made by the plaintiff to the defendant. This was the sole payment ever made by the plaintiff, and he had no right of action to recover for any usury paid by him, until he made this payment to the defendant. That the plaintiff might have successfully resisted the payment of the usurious part of the note as against the defendant, admits of no doubt, because the case shows the fullest knowledge by the defendant of the illegality of this portion of the note when he purchased it. The plaintiff's counsel say that he could have done so, if the defendant had been an innocent purchaser of the

note while current. But this we think admits of great doubt. Under the English statutes against usury, which expressly made the security infected with usury void, this was so, and so of all notes or other securities founded on considerations made illegal by statute, when the statute so declares. But where the consideration is merely declared illegal by statute, without saying the security shall be void, we understand the settled law to be otherwise, and that such security is good in the hands of an innocent holder for value, if taken in the due course of business in the mercantile sense. This was so held in this state in *Converse* v. *Foster*, 32 Vt. 828, in the case of a note given for liquors sold in violation of the statute.

And the same has been decided in Massachusetts, under their statute restraining the sale of spirituous liquors, which is much like ours. But it does not necessarily follow, that because the plaintiff might have avoided the payment of the usurious part of the note to the defendant, if he voluntarily paid it, he could recover it back as usury paid. For my own part, I do not see any great objection to allowing the action to be sustained against a party with whom the usurious contract was not made originally, but who has purchased the note and received payment of it with full knowledge that a portion of it was usurious. But we are not prepared to decide this without more consideration, and neither do we find it necessary to the determination of this case. The defendant we think was a party to the usurious contract in this case, so as to make him liable to repay so much of the usury paid, as he received, though not named as a party in the security given. He was the party who actually made the contract for the loan with the plaintiff, and procured Hubbard to furnish the money. We do not mean to decide that one who as the mere agent of another effects an usurious loan, becomes liable, but the defendant was more than this; he was a party really interested and intended to be benefitted by the usurious part of the agreement.

Notwithstanding the various shifts and falsehoods told to cover it up, the real contract is apparent. Hubbard furnished the seven hundred dollars that was really loaned to the plaintiff, and the one hundred and forty dollars usury included, was for the mutual benefit of Hubbard and the defendant, and they were to divide the plunder

equally. If under this agreement the defendant received his share of the usury, we see no reason, upon the strictest construction of the statute, why he should not be compelled to repay it. It would not be claimed that one could avoid liability for usury taken by him because he made his note payable to another man.

And we do not see why the defendant should not be equally liable as if a note for one-half the usury had been made payable to, and actually paid, directly by the plaintiff to him.

That the defendant actually did receive his half of the usury is found by the referee, and that it was all paid by the plaintiff. But the defendant claims that if he was ever liable to the plaintiff for any usury received by him, it was paid and received more than six years before this suit was brought, and is therefore barred by the statute of limitations.

It was decided by this court in the recent case of *Davis* v. *Converse et al.*, 35 Vt. 503, that the statute applies to such payments. Did the plaintiff's claim for usury paid, as against the defendant, accrue more than six years before the commencement of the action?

Soon after the usurious note was executed by the plaintiff to Hubbard, (as the security for it was ample), Hubbard paid over to the defendant his half of the usury, and this was more than six years before suit; and the defendant alleges that if he ever received any usury it was then. But this was a matter the plaintiff had nothing to do with. He had paid nothing, and notwithstanding he had given his obligation to pay, he could recover nothing until he had actually paid more than the legal part of the note and the lawful interest thereon.

The referee reports that when the defendant took the note from Hubbard he paid him the full face of the note. The defendant claims therefore that when the full amount of the note was paid him by the plaintiff, he only paid him what he had paid to Hubbard, and that therefore he received no usury. But this fact is to be taken in connection with what had already transpired, that the defendant had then in his hands one-half the amount of the usury which he had received from Hubbard, so that really he paid Hubbard for the note, deducting one-half the usury. The case stands, so far as this question is concerned, just as if the plaintiff had paid the lawful part,

and one-half the usurious part, to Hubbard, and then Hubbard had handed the note to the defendant, and the plaintiff had paid the other half of the usury to him. The plaintiff was not affected by the payment Hubbard made to the defendant; no right then accrued to him, which he could enforce, and therefore no time began to run against his right.

The plaintiff found the note wholly unpaid in the defendant's hands, and paid the full amount to him, and he had the right to understand that the defendant took the usury under and according to his original contract to have it. We think therefore the cause of action arose when the plaintiff made the payment to the defendant.

The defendant was the actual party making the oppressive and usurious contract with the plaintiff; he was to share in the usurious part of the agreement, and did so; the plaintiff has paid the usury and the defendant has received it; and it would be a reproach to the law, if it is so impotent that it can give no redress against the real wrongdoer. On this subject of usury the law disregards all pretence and sham, and deals with the reality, and wherever one has usury in his pocket, it will reach it, by whatsoever name it may be called.

Judgment affirmed.

JOHN WORDEN *v.* MARTIN V. B. POWERS.

Declarations. Evidence.

The declarations of a party in his own favor, made after the transaction in question was completed and the parties thereto separated, however short the time, are not admissible in evidence.

They are only admitted when concurrent with the act or transaction of the party, as a part thereof, and to characterize and explain it, when alone and unexplained it might be equivocal in its character.

TRESPASS for breaking into and crossing the plaintiff's premises,

and trampling down and destroying his herbage, &c. The case was referred to a referee who reported the facts substantially as set forth in the opinion of the court.

At the September Term, 1863, BARRETT, J., presiding, the court *pro forma* rendered judgment for the plaintiff, on the referee's report,—to which the defendant excepted.

Charles N. Davenport, for the defendant.

I. The referee erred in excluding the evidence offered. It was the declarations of the defendant accompanying the act of going from the place of meeting, and therefore admissible as part of the *res gestæ*. 1 Green Ev. § 108, *et seq.;* 2 Cowen & Hill's notes, 585, *et seq.; Ross* v. *Bank of Burlington*, 1 Aik. 43; *Holbrook et al.* v. *Murray et al.*, 20 Vt. 525; *State* v. *Howard*, 32 Vt. 380; *Eddy* v. *Davis*, 34 Vt. 209.

Field & Tyler, for the plaintiff.

When declarations, offered in evidence, are merely *narrative of a past occurrence*, they cannot be received as proof of the existence of such occurrence; they must be cotemporaneous with the main fact. Green. Ev. 126, § 110; *Banfield* v. *Parker*, 36 N. H. 353. But declarations of a party, at another time, in his own favor, and in the absence of the adverse party, cannot be used in support of the claim of the party making them. *Bonie* v. *Stonestreet*, 6 Md. 418; *Ogden* v. *Peters*, 15 Barb. 560; *Woods* v. *Banks*, 14 N. H. 101; *State* v. *Davidson*, 30 Vt. 378; *Elkins* v. *Hamilton*, 20 Vt. 627; *Bank of Woodstock* v. *Clark*, 25 Vt. 308; Green. Ev., § 102 and notes. There are but few exceptions to the rule that, when a person is a competent witness to prove a fact, his declarations as to such fact are not admissible. *Ross* v. *Knight*, 4 N. H. 236; *Woodard* v. *Paine*, 15 Johns. 493; *Bacon* v. *Charlton*, 7 Cush. 581. And this case is not within any exception to the rule. Green. Ev., 148, § 108, and notes.

POLAND, Ch. J. The defendant claimed that he made a contract with the plaintiff by which the plaintiff gave him license to cross his land, and that he paid the plaintiff fifty cents therefor. The plaintiff denied making such contract or giving such license, and also denied meeting the defendant at the place where the defendant said the contract was made. The defendant introduced evidence tending

to prove that the parties did meet at the place where the defendant claimed they did. The defendant then offered to prove that soon after, he told two witnesses that he met the plaintiff, and what transpired between them. The report states that the defendant did not offer to prove what he said the transaction was. It seems to us that this statement pretty much neutralizes the offer, and that if the defendant did not offer to prove his own statement of the transaction between him and the plaintiff, he made no offer at all. But waiving all criticism as to this, was it admissible for the defendant to prove his own statement, as to the contract with the plaintiff, made soon after he claimed the contract was made? It seems clear to us that it was not, and that the referee properly rejected the evidence.

It was a mere narrative of a past transaction which was already complete and finished. The fact that it was *soon after* makes no difference. The declarations of a party in his own favor, are not admitted, on the ground that they are made while fresh in his memory, and so soon that he could not have forgotten and that he probably has not had time to imagine or concoct a false account. They are only admitted when concurrent with an act or transaction of his, and as a part of the act or transaction itself, and to characterize and explain the act or transaction, which alone and unexplained, might be equivocal in its character.

If the act and the declaration are not concurrent, and the act is finished and past before the declaration is made, then it becomes a mere narrative of a past transaction and inadmissible, and the length of time that intervenes is not important. It is difficult to see how any declaration of the defendant, on the subject of this dispute between them, ever could be admissible unless made in the presence of the plaintiff. In its legal character it was wholly immaterial whether made half an hour, or half a day, or half a year afterwards. The interview between the parties, and the transaction between them was over and ended, and the parties separated, and when the defendant made the statement he offered to prove, he was not acting in any way under the contract he claimed he had made, or exercising any right he claimed thereby to have acquired. It was a clear case of naked narrative declaration. *Elkins* v. *Hamilton*, 20 Vt. 627, was a

much stronger case for the admission of the parties' declarations, but the court reversed the judgment below because they were admitted.

In *Ross* v. *Bank of Burlington*, the plaintiff's declarations which were admitted all accompanied some act of his in reference to the money, and were all made prior to the loss of his money by the burning of the boat, and when he could not possibly have anticipated any such event.

Judgment affirmed.

Bellows Falls Canal Company v. Town of Rockingham.

Taxes. Grand List. Water Power.

Property consisting of several buildings connected together may be set in the grand list together under an appropriate name, or may be divided up, giving the value of each building by itself.

The statute, § 20, ch. 83, G. S., providing that the listers shall set in the list of each taxable person the quantity of real estate owned or occupied by him, has reference to farms and agricultural lands, not to small parcels used for buildings, where the value depends on mere location and business; but if not so set in the list in either case, it does not render the list void, or give the owner any action against the listers, or the town, without showing that the neglect has worked him some loss or injury.

When a water power is applied to a mill or factory, it should be taxed with and as a part of it, and when unimproved, it should be taxed with the land to which it belongs, if its existence adds to the value of the property.

Assumpsit to recover for money collected for taxes in Rockingham in 1860. Trial by the court by the consent of the parties, September Term, 1864, Barrett, J., presiding.

The plaintiffs claimed to recover on the ground that the list of the plaintiffs' property included within the bracket below was improperly made, and is invalid. The case was tried upon an agreed statement of facts, from which it appeared that the property taxed con-

sisted of the locks and canal, and buildings, consisting of mills, shops, dwelling houses, &c., standing upon the margin of the canal, and land; and that the same was set in the list of 1860, as follows:

Bellows Falls Canal Company, house, barn and tripe house, 1-4 acre,	$ 350
Locks and canal,	9000
Two offices,	700
Old blacksmith shop,	200
New blacksmith shop,	500
Saw mill,	1500
House on beach,	250
Iron foundry,	600
Double D. House,	800
Peg factory,	750
Machine shop and blind shop,	1400
Buildings on three acres,	900
Church mill, 12 1-3 acres,	1250
Meadow land 14 acres,	2100
Meadow 12 acres near meeting house,	2100
Total,	$22400

It appeared from the listers' statement agreed upon by the parties, that they examined the real estate included under the head of locks and canal, and came to the conclusion that it should be appraised at the sum of nine thousand dollars, and so appraised it; that from the point where the water is taken from the river into the canal, to the point where the same empties into the river again, being conveyed through the locks and canal, is a distance estimated at one hundred and sixty rods; and the width of the canal is about sixty feet, and a strip of land on each side of the canal is about twenty feet wide, making the entire width of the canal and land one hundred feet; that the above described estate is not appraised under any other head, and is not included in the list under any other item in said town of Rockingham; and that at the time of the appraisal the locks and canal were useless and worthless for the purposes of navigation, and had been abandoned by the canal company for such use, and that the canal was used simply for a reservoir from which water

was drawn to supply the several mills, and that the mills with the water power that propelled their machinery were all separately appraised and adjudged, as appears by the grand list, and further that they appraised the locks and canal as real and not personal estate.

The plaintiffs paid upon the appraisal of 1860, for town taxes, $216,00

Bellows Falls village taxes, 45,00

Bellows Falls district school taxes, 115,20

All which was paid before the date and service of the plaintiffs' writ in this case, and amounts to $376,20.

The defendant conceded that the canal company was duly chartered, &c.

Upon these facts the court *pro forma* rendered judgment for the defendant,—to which the plaintiffs excepted.

Field & Taylor, for the plaintiffs, cited *Henry* v. *Chester*, 15 Vt. 470; *Spear* v. *Braintree*, 24 Vt. 414; *Torrey* v. *Millbury*, 21 Pick. 65; *Thames Manufacturing Co.* v. *Lathrop*, 7 Conn. 550; *Thayer* v. *Stearns et al.*, 1 Pick. 482; *Thurston* v. *Little*, 3 Mass. 429; *Hutchins et al.* v. *Moody*, 34 Vt. 433; *Stearns* v. *Miller et al.*, 25 Vt. 20; *Boston Manufacturing Co.* v. *Newton*, 22 Pick. 22; *City of Lowell* v. *County Commissioners of Middlesex*, 6 Allen, 131; *Drew* v. *Davis*, 10 Vt. 506; *Libby* v. *Burnham et al.*, 15 Mass. 144.

H. E. Stoughton, for the defendant, maintained that the school district and village corporation taxes are not recoverable in this action. *Spear* v. *Braintree*, 24 Vt. 419; *Vt. Central R. R.* v. *Burlington*, 28 Vt. 193; *Slack* v. *Norwich*, 32 Vt. 828. The burden of proof is on the plaintiffs to establish the invalidity of the town tax. *Briggs* v. *Whipple*, 7 Vt. 20.

The requirements of the statute as to inserting in the list the number of acres, cannot affect the relation as between individuals in towns. Treating this omission as an irregularity which does not render the tax void, which is the most favorable ground for the plaintiffs, and that in such case they, in the action for money had and received, are entitled to recover the damage they have sustained, what sum are they entitled to recover? Certainly nothing, for the case fails to show any damage, and it is impossible to conceive of any. *Fairbanks* v. *Kittredge*, 24 Vt. 12; *Spear* v. *Braintree*, 24 Vt. 414; 25 Vt. 20.

POLAND, Ch. J. The burden of proof is on the plaintiffs to show that the taxes sought to be recovered back in this action, were illegally collected. It is claimed that the plaintiffs' grand list upon which the taxes were assessed was illegal and void, and so the taxes assessed on it void.

1st, Because the same property was twice included in the list and thus the plaintiffs made to pay double taxes upon it. That the whole property was put in, under the head of *locks and canal*, and again in items of *buildings*, *shops*, *&c.*

The case instead of showing this, (as the plaintiffs would be bound to do, in order to recover on this ground,) shows exactly the contrary. The property being all connected together, not divided into separate parcels at all, the listers might properly have set it in the list in one gross sum, under any appropriate name or description so as to be reasonably certain what made up the list.

But the fact that they divided it up separately, giving the value of each building by itself, was equally proper, unless thereby the property or some of it was thus put twice in the list.

It does not appear very distinctly, whether under the head of *locks and canal*, the listers intended to include the land covered by the buildings, and then added the value of the buildings alone, without reference to the land covered by them, or whether with each building they included the value of the land it occupied. And we do not regard it as at all material which way it was done, if no more than all the land, and all the buildings, were once included in the list. There is no evidence that any injury or prejudice resulted to the plaintiffs from the mode adopted in making up their list.

2d, Because the listers neglected to ascertain the quantity of land, and to state the quantity of land in the list.

This requirement of the statute is evidently for the purpose of enabling the county average and equalization to be made between the different towns in the county, and the state average to be made between the different counties, so that it may appear at what rate per acre the lands of a town have been appraised and set in the list. The only object to be attained by this, is attained by having it done in reference to farms, and agricultural lands, and can be of no avail in reference to small parcels, used for business, as for factories, mills,

stores, &c., or for mere dwellings and gardens, where the value depends on mere location and business.

But where it is required, as in the case of a farm, it is not for the benefit of the owner, but for public purposes, and if neglected to be done in such cases, it does not render the list void, or give the owner any action against the listers, or against the town, without showing that it has worked him some loss or injury. Such provisions, so far as the tax-payer is concerned, are to be considered as directory merely. *Torrey* v. *Millbury*, 21 Pick. 64.

3d, The plaintiffs claim the listers should have stated how much land they appraised with each of the buildings separately.

If it is to be inferred they appraised any land with those buildings, we think it must be so much as each building covered, and there is nothing in the case to show that in fact any more was specially attached to, or used with the building.

4th, The plaintiffs claim that the value of the canal as a reservoir, furnishing water power, was either twice included, once under the head of *locks and canal*, and again with each mill and shop, or else that it was wholly included under the head of *locks and canal*, separate from the mills carried by it, and that either mode made the list illegal.

It does not appear but that such part of the water power furnished by the canal, as was applied to any mill or shop, was included in the valuation of such mill or shop.

If there was any remaining capacity in the canal to furnish water power, not used, which made the structure or reservoir more valuable, it was properly appraised with, and as a part of the property itself. It may be conceded that a water power, as such, unconnected with any mill or other erection, and disconnected from any land, is not a proper subject of taxation.

But when applied to a mill or factory, to the extent it is thus applied, it becomes a part of the mill or factory itself, and should be taxed with, and as a part of it; and when unimproved, it is to be taxed with the land to which it belongs, if its existence adds to the value of the property. *Boston Manuf. Co.* v. *Newton*, 22 Pick. 22.

In *City of Lowell* v. *Co. Comm'rs of Middlesex*, 6 Allen, 131, the proprietors of the locks and canals on Merrimac river, (which were

made for the purpose of creating and furnishing water power,) had leased or contracted portions of the water power to certain companies, and the same was used for operating their factories or mills. These mills and factories were assessed at an increased rate, in consequence of the use of such power.

The owners of the locks and canals had a surplus water power which was unemployed. In assessing the value of the locks and canals, this surplus water power was added to their value, and it was decided that this was proper and legal.

That case seems fully to justify the action of the listers in the present case, so far as we are able to learn from the exceptions and accompanying papers what was done.

We have been wholly unable to find in this case, that there has been any double taxation of any portion of the plaintiffs' property, or that anything was done by the listers in assessing their property that has worked them any wrong. Nor are we able to discover any such irregularity in the form or mode of making up their list, as should render it void; and if there has been a failure to comply with all the requirements of the statute, they are not of a character that could prejudice the plaintiffs, or of which they can be heard to complain.

Judgment affirmed.

Abel Galpin *v.* N. F. Barney.

Statute of Limitations. Agency. Promissory note.

When the plaintiff called on the defendant for the pay on the note in question, the defendant "told him he ought to have his pay, that it was right he should have it, but that he had lost a good deal in the business and was not worth anything and could not pay it." *Held*, that under the rule established in *Phelps* v. *Stewart*, 12 Vt. 256, this acknowledgment was not sufficient to take the case out of statute of limitations.

B. had given the note in question as the agent of the defendant, though in fact the business was his own, and the defendant had no interest therein, and after the agency terminated and the defendant had refused to pay the note, B., upon being

called upon by the holder to give a new note, refused, saying he had no authority, but paid and endorsed a dollar on the old one. *Held*, that this did not renew the note as against the defendant.

ASSUMPSIT on a promissory note. Pleas, the general issue, and the statute of limitations. The case was referred and the referee reported, substantially, that Norman H. Batchelder carried on the business of manufacturing chairs from 1844 up to 1849, when he failed; that after the failure, by an arrangement between Batchelder and the defendant, the business was carried on as before by Batchelder, in the name of the defendant, Batchelder acting as defendant's agent, but the defendant had no interest in the matter other than to assist Batchelder, and took no active part in the business. He went to some merchants in the vicinity to tell them they might pay on his account orders drawn by Batchelder, and he gave Batchelder leave to use his name in drawing such orders. And Batchelder drew orders in the defendant's name on said merchants, and this was known to the plaintiff. But before the execution of the note in controversy the defendant forbade Batchelder's so signing his name to notes without his leave, and no more notes were ever given by Batchelder as the agent of the defendant except the one in suit.

The plaintiff worked for Batchelder before his failure, and after Batchelder commenced business as agent of the defendant, he employed the plaintiff to work for him. The defendant paid him from time to time for a portion of his services, and on the 6th of December, 1850, Batchelder settled with him and gave him the note in controversy of which the following is a copy:

"ARLINGTON, December 6th, 1850.

"One day after date, for value received I promise to pay Abel Galpin or bearer forty dollars, with use.

Signed, N. F. BARNEY,
N. H. BATCHELDER, Agent."

There is endorsed on said note "October 4th, 1856," as follows: "Paid on the within one dollar."

The defendant had no knowlege of this note until the day of the endorsement, when the plaintiff called on him and told him he wanted his pay or the note renewed. The defendant told him he ought to have his pay, that it was right he should have it, but that

he had lost a great deal in this business and was not worth anything and could not pay it. The plaintiff then went to Batchelder, and asked him to pay the note or renew it. Batchelder told him he had no right to give a new note, but he would pay him one dollar and endorse it on the note, and that would renew it. He then paid from his own money one dollar and made the endorsement on the note. The defendant himself never promised to pay the note unless he did so in the manner before stated, by Batchelder as his agent. The defendant failed in about four years after the failure of Batchelder. After the failure of the defendant there were some small matters of book account which were settled by Batchelder. The books remained with the said Batchelder till the shop burnt in September, 1857. The defendant never claimed to have any interest in the accounts, and never received anything from them, and there was no proof that the books ever passed into his hands. It did not appear that Barney revoked the authority of Batchelder as agent till after the endorsement made upon said note. He did revoke said authority afterward. If from the foregoing facts the plaintiff is entitled to recover, he should recover the amount due on said note April 12th, 1864,—$70.62.

On this report the court, at the April Term, 1864, BARRETT, J., presiding, rendered judgment for the defendant to recover his costs, —to which the plaintiff excepted.

Butler & Wheeler and *E. L. Waterman*, for the plaintiff.

E. E. Kellogg, for the defendant.

PIERPOINT, J. As we think the defence of the statute of limitations must prevail in this case, it becomes unnecessary to consider the other questions that have been discussed.

The plaintiff's right to recover is barred by the statute, unless what was said to him by the defendant on the 4th of October, 1856, or what was done by Batchelder on the same day, was sufficient to prevent its operation.

When the plaintiff called on the defendant for the pay on the note, on the 4th of October, the defendant "told him he ought to have his pay, that it was right he should have it, but that he had lost a great deal in the business and was not worth anything, and he could not pay it." When we consider that the debt to the plaintiff was one

that (although contracted in the name of the defendant and for which he was legally liable) was really a debt that was contracted by Batchelder in his own business, and in which the defendant had no interest, and that it was a debt that Batchelder ought to pay, the language used by the defendant can hardly be regarded as an acknowledgment of a subsisting debt against himself; he says the plaintiff ought to have his pay, that it was right he should have it; this he could say without acknowledging that he was liable and ought to pay it. But conceding this to be an acknowledgment of the debt, that is not sufficient to take it out of the statute. "There must be an acknowledgment of the debt as still due, with an apparent willingness to remain liable for it, or at least without an avowed intention to the contrary." This rule was established in *Phelps* v. *Stewart*, 12 Vt. 256, and has been adhered to in this state ever since.

The acknowledgment must be such that a promise to pay the debt may fairly be inferred from it. In this case the defendant at the same time that he said the plaintiff ought to have his pay, also said that he had lost a great deal in the business, was poor and could not pay it. We think it would be impossible fairly to infer a promise to pay from such a declaration. When taken together with the facts as found by the referee, it sounds more like a declaration of an intention not to pay.

The plaintiff seemed at the time so to regard it, for he immediately went to Batchelder and asked him to pay the note or renew it, thus showing that he did not understand the defendant to have said anything that would operate to renew the note.

The referee has expressly found that the defendant did not promise to pay the note unless he did so by said Batchelder as his agent.

When the plaintiff went to Batchelder and asked him to pay the note or renew it, Batchelder told him he had no authority to make a new note, but proposed to pay him a dollar and endorse it on the note, saying that would renew it. He therefore paid the plaintiff a dollar from his own money and endorsed it upon the note. This we think cannot have the effect to renew the note as against the defendant. It is difficult to see, if he had no authority to bind the defendant by giving a new note, how he could bind him by a new promise

to pay the old one. He does not appear to have professed to act as the agent of the defendant in making the payment and endorsement, but the fair inference from the report is, that both understood at the time the payment was made, that Batchelder was paying his own money and in his individual capacity.

Judgment affirmed.

DAVID M. WHITTAKER *v.* MARTIN PERRY, GEORGE T. ALLEN AND JOHN W. MOORE.

Pleading. Recognizance. Forcible Entry and Detainer.

Where a plea is filed in the justice court and an appeal taken, the defendant may, but need not, file a new plea in the county court.

A plea in abatement, defective in form as such, may be sufficient as a motion to dismiss for want of a recognizance for costs. The plea in this case so held.

In a case of forcible entry and detainer the justices issuing the warrant, authorized by § 4, ch. 46, G. S., should take security for the costs of prosecution, or the proceedings will be dismissed upon motion.

FORCIBLE ENTRY AND DETAINER. The complaint was signed by Marshall Newton, assistant judge of Windham County Court, and by W. E. Osgood, justice of the peace. The defendants filed a plea in abatement in the justice court, as follows:

"The said defendants move this honorable court that said process abate, because they say that said process was issued by said Marshall Newton, assistant judge of Windham County Court, and said Willard E. Osgood, justice of the peace, within and for said county, without any security being given to the defendants by way of recognizance by any person other than the plaintiff that the plaintiff would prosecute his writ to effect, and pay all damages, if judgment be rendered against him; and also without any minute of any recognizance with the name of any surety, or the sum in which he was bound being indorsed on said writ, at the same time signing the same."

The defendants also pleaded a judgment, recovered in action of trespass against the same parties, in bar,—to which the plaintiff demurred.

The court, at the September Term, 1864, BARRETT, J., presiding, sustained the demurrer and adjudged the plea insufficient, and rendered judgment for the plaintiff for restitution of the premises, and that the defendants pay a fine of ten dollars, and the costs,—to which the defendants excepted.

Other facts appear in the opinion of the court.

Field & Tyler and *Butler & Wheeler*, for the defendants.

Charles N. Davenport, for the plaintiff.

PIERPOINT, J. The first question is in regard to the plea in abatement. The plea was filed before the magistrate. No new plea was filed in the county court. When the question came up on this plea, at the second term after the suit was entered in the county court, it was adjudged insufficient as not having been filed in that court, and as defective in substance.

We think it was not necessary that a new plea should have been filed in the county court. The appeal took the case to the county court as it stood before the magistrate. A new plea is no more necessary in the county court than a new declaration,—the parties may file either, but are not obliged to. If they do not, they must go to trial upon the pleadings as they stood before the magistrate.

Is the plea in abatement defective? As a technical plea in abatement we think it is defective in form; but as a motion to dismiss, which is all that the statute requires to take advantage of the want of a recognizance for costs in the writ, we think it is sufficient.

The question then arises, is a recognizance for costs necessary, upon the issuing of a process of this character?

By § 29, ch. 31, G. S., it is provided that "suits returnable before a justice, may be commenced by writ of summons or attachment, signed by the justice to whom it is made returnable, and before issuing it, such justice shall take security for the costs of prosecution."

Is this proceeding a suit within the meaning of this section of the statute? It is a proceeding between the individual parties to it, the plaintiff and defendants, in which the public have no special interest, instituted upon the complaint of the plaintiff to redress an injury

alleged to have been done to him by the defendants. He has the entire control of it, and may prosecute, or discontinue it at pleasure. He is made responsible to the defendants for costs, in case he fails. The process issues against the defendants in the form of a warrant; not requiring them to be brought forthwith before the magistrate, but they are by statute to have at least six days notice of the time and place of hearing. It is simply an attachment against the body, and is to be served by the officer to whom directed, by the arrest of the body of the defendants, and having them before the magistrate at the time and place of trial; but if the defendants are not found by the officer, then the process may be served as a summons by leaving a copy thereof at the last and usual place of abode of the defendants, at least six days before the time appointed for a hearing.

If upon a hearing the defendants are found guilty of the acts charged in the complaint, judgment is rendered that the plaintiff have restitution of the premises, and the magistrates impose such fine, not exceeding ten dollars, as they under all the circumstances may think just, and tax the cost in favor of the plaintiff.

In the statute relating to proceedings of this character, there is no specific provision that the complainant shall give security for costs, in case he fails, but it is expressly provided that if he fails he shall pay costs to the defendants. And the policy of our law is, that when a person institutes proceedings for the redress of an injury to himself, in which he is liable for costs if he fails, to require him to give security to the opposite party for the payment of such costs, in case judgment therefor is rendered against him.

And we can see no reason why this class of cases should be an exception to the general rule. If the legislature had not understood that proceedings of this character come within the provision of the statute before referred to, regulating the giving of security for costs in suits returnable before justices of the peace, they would have specially provided for it.

It was decided at an early day by the supreme court of this state, that "bonds for prosecution must be given before the warrant issues to bring the body before a freehold court." Brayton's R. 125. We think it has been the general understanding of the profession that it

was necessary, and the practice has corresponded with such understanding.

We think that in this case security for costs should have been taken before the warrant issued, and that for want of it, the judgment on this motion should have been that the proceedings be dismissed.

This view of this question renders it unnecessary to consider the other questions that have been discussed.

Judgment of the county court reversed, and judgment entered that the suit be dismissed.

FRANCIS D. PROUTY *v.* TIRZAH BISHOP AND OTHERS.

Wills.

The testator, among other bequests, gave to Francis D. Prouty, for the comfortable maintenance of his daughter Polly Miller, during the term of her natural life, the use of certain specified property, including both real and personal estate, and immediately following the list of property so given, is this provision: "It is my will, and I do hereby order, that my executors, administrators and assigns, upon the decease of my daughter Polly Miller, in the division of the above named property left for her comfortable maintenance, both real and personal, do allow the said Francis D. Prouty an equal share with the male children of my daughter Tirzah, wife of Isaac Bishop, and the male children of my late daughter Almira, late wife of Dan Mather. The same I do give and bequeath unto the said Francis." *Held*, that the testator intended by said provision to make a final disposition of all the property referred to therein, by directing a division of it between Prouty and the male children of his said two daughters,—Prouty and the children taking the whole in equal proportions according to the whole number.

APPEAL from the probate court in ordering a distribution of the property of Abraham Miller, deceased.

The plaintiff introduced an agreed statement of facts, which were admitted, subject to the objection by the defendants that the facts were not pertinent, and to the admission of which the defendants excepted.

The facts agreed upon were as follows:

"1. That the testator deceased on or about the —— day of —— A. D. 1850,

2. That testator's will was drawn by one Abel Patten, a clergyman, not skilled in the use of technical terms, and little accustomed to drafting wills.

3. That Francis D. Prouty, named in said will, was the son of the testator's wife, Hannah Miller, by a former marriage, and that said Hannah was the testator's second wife.

4. That said Francis D. Prouty had lived with the testator for several years before his decease, and before the making of his will.

5. That the testator, at the time he made his will, had no son or sons then living.

6. That the whole estate of the testator inventoried at $12276.20.

7. That after paying debts, legacies, &c., aside from the trust estate devised to Francis D. Prouty for the life of Polly Miller, there was a surplus of $2261.55, which was by order of the probate court distributed under the residuary clause of the will, one-half to Mrs. Tirzah Bishop, and the other half to the children of Almira Mather,—each of the children of said Almira receiving the sum of $161.54, being 1-7th to each."

The probate court decreed to Francis D. Prouty $50., being the same sum given by the will to the male children of Almira Mather, and of Tirzah Bishop.

The will provided: 1. For payment of debts. 2. One thousand dollars for the testator's wife, and a home out of his property on the farm with his daughter Polly. 3. Ten dollars each to children of Elihu Mather. 4. Same to female children of Dan Mather. 5. Fifty dollars each to male children of Dan Mather. 6. Ten dollars each to female children of Isaac Bishop. 7. Fifty dollars each to male children of Isaac Bishop. 8. One dollar each to children of A. D. Miller. 9. In trust to Francis D. Prouty for maintenance of his daughter Polly, twenty-five shares in Springfield Bank, (Mass.,) and the use of home farm, with stock, tools, furniture, &c. The 10th provision was in these words: "It is my will, and I do hereby order, that my executors, administrators and assigns, upon the decease of my daughter, Polly Miller, in the division of the above named property left for her comfortable maintenance, both real and personal, do allow the said Francis D. Prouty an equal share with the male children of my daughter Tirzah, wife of Isaac Bishop, and the male

children of my late daughter Almira, the late wife of Dan Mather. The same I do give and bequeath unto the said Francis." 11. The rest and residue of his estate was given one-half to the children of his daughter Almira, late wife of Dan Mather, and one-half to his daughter Tirzah, wife of Isaac Bishop.

All the children above referred to as legatees were named in the will. Other facts are stated in the course of the opinion.

The Court, at the September Term, 1863, BARRETT, J., presiding, *pro forma*, adjudged that Francis D. Prouty was entitled under the will to an equal share with the male children named in the will, of said Almira and Tirzah, in the property, real and personal, which was left by the testator for the maintenance of his daughter Polly, to be divided so that Prouty and each of said male children should have an equal share of said property, and that the appellant recover his costs of the appeal. To this judgment as to the division of said property both parties excepted.

Charles N. Davenport, for the plaintiff, as to the general rules to be observed in the construction of wills, cited 1 Green. Ev., § 287 and note 3; 1 Phillips' Ev., 543; 1 Jarman on Wills, 363; 2 *Ib.* 742–3; *Dawes* v. *Swan*, 4 Mass. 208; *Parsons* v. *Winslow*, 6 Mass. 169; *Dow* v. *Crawford*, 3 Halst. 90.

Field & Tyler, for the defendants, cited in respect to the general rules of construction of wills, Redfield on Wills, 433; 2 Jarman on Wills, 741; *Button Ex'rs* v. *Am. Tract Society*, 23 Vt. 336; *Lamb* v. *Lamb*, 11 Pick. 371, 375.

It is a well known maxim that an heir at law can only be disinherited by express devise or necessary implication, and that implication must be such a strong probability that an intention to the contrary cannot be supposed. 1 Jarman on Wills, p. 465; 2 *Ib.* 740; *Hayden* v. *Stoughton*, 5 Pick. 528; *Grout* v. *Hapgood*, 13 Pick. 159; *Ferson* v. *Dodge*, 23 Pick. 293; *Scauber* v. *Jackson*, 2 Wend. 13; *Trent* v. *Hanning*, 7 East, 97; *Fullam* v. *Wickett*, Willes R. 303; Redfield on Wills, 434; *Hitchcock* v. *Hitchcock*, 35 Penn. St. R. 393. An *intention* to disinherit the heir is always necessary to raise an estate by implication. 1 Jarman on Wills, 465 and note 2; *Rosefelt* v. *Heirs of Felton*, 7 Cowen, 71; *Jackson* v. *Scauber*, 7 *Ib.* 187. The decision of the county court makes the will disinherit Tirzah Bishop,

and the female children of Mrs. Mather, while no intention to disinherit them can be found in the will. See *Cook* v. *Holmes*, 11 Mass. 530; *Homer* v. *Shelton*, 2 Met. 194, 198; *Smith* v. *Bell*, 6 Peters. 68, 75.

PIERPOINT, J. The question in this case is as to the construction of the last will and testament of Abraham Miller, deceased.

The testator, among other bequests, gave to Francis D. Prouty, for the comfortable maintenance of his daughter Polly Miller during the term of her natural life, the use of certain specified property, including both real and personal estate, and immediately following the list of property so given, is this provision: "It is my will, and I do hereby order, that my executors, administrators and assigns, upon the decease of my daughter Polly Miller, in the division of the above named property left for her comfortable maintenance, both real and personal, do allow the said Francis D. Prouty an equal share with the male children of my daughter Tirzah, wife of Isaac Bishop, and the male children of my late daughter Almira, late wife of Dan Mather. The same I do give and bequeath unto the said Francis."

It is in regard to the above recited clause in the will that the question arises.

There is no substantial difference between the counsel in the case, as to the general rules to be observed in the construction of wills. The intention of the testator when it can be legally ascertained, is always to govern and be carried into effect, and in ascertaining the intent, the whole instrument should be taken into consideration, and viewed in the light afforded by the situation of the party making it, the subject matter and the surrounding circumstances, and to this end the facts stated in the case as made up may properly be considered. Indeed, no question has been made in this agreement but what such facts are properly in the case.

The provision in the will above referred to is certainly very unskillfully drawn, and the intention of the testator, whatever it may have been, is very unhappily and darkly expressed therein. The difficulty in ascertaining the intent, is increased by the fact that the testator in the preceding part of the will, had given to the male

children of the said Dan Mather, and said Isaac Bishop, naming them, the sum of $50. each.

It is claimed by the defendants that the sole intention of the testator, by the provision above recited, was to give to the said Francis the same amount that he had before given to the said male children of the said Dan and Isaac,—that is, $50.—to be paid out of the property he had devised in trust for his daughter Polly, after her death.

If such was the intention, it is astonishing that he should have adopted such a singular mode of expressing it, when a few simple words would have expressed the idea clearly and unequivocally. He had only to adopt the same language he had twice before used, in the same instrument, in giving a similar legacy to each of the male children of two of his daughters. There was no occasion to speak of it as an act to be done in the *division* of that part of his property that was to be disposed of after his daughter's death, or to refer to that part of his property as being both "real and personal," or to specify the amount as "an equal share with the male children" of his said two daughters, an expression that is in itself equivocal, leaving it somewhat doubtful whether a sum equal to that of one of such male children, or a sum equal to that of all of said male children was intended.

Looking at the peculiar phraseology of this provision of the will, we think it quite apparent that it was not the intention of the testator thereby to give the said Francis the sum of fifty dollars only.

Taking the whole instrument together, and considering it in connection with the situation of the testator, and the surrounding circumstances, we are satisfied that it was the intention of the testator, by the ninth and tenth clauses in the will, to make a complete and final disposition of all that part of his estate which he bequeathes to said Francis D. Prouty in trust for the use of his daughter Polly.

It seems to us that the language used is consistent with no other idea. The clause under consideration contemplates a division of all such property, "both real and personal," after the death of said Polly, and directs his executors *in such division* to allow the said Francis D. *an equal share* with the male children of his daughters,

Tirzah and Almira. It is very evident that the property referred to as that which was to be divided, and which the said Francis D. was to share equally with the said male children, was the property the use of which the testator had in the preceding clause appropriated to the maintenance of his daughter Polly; and it seems to us that the only rational and consistent construction that can be put upon this clause, is that the testator, by it, intended to make a final disposition of all of that part of his property, by directing a division of it between the said Francis D. and the male children of his said two daughters. The clause is very unskillfully and blindly expressed even for that purpose, but this construction makes it consistent with itself, and all the other parts of the will, while any other construction makes a large part of it a collection of unnecessary and useless words.

That there is to be a division of this property is clearly indicated, and the persons between whom it is to be divided we think are also indicated,—that is, between Francis D. Prouty and the male children of the said two daughters,—and that in such division the said Prouty is to have an equal share with such children; not a share equal to that of the male children of each of the two daughters, but a share equal to that of each of the male children of the two daughters,—the said Prouty and the said children taking the whole in equal proportions according to the whole number.

The last sentence in this clause of the will was wholly unnecessary, and is not inconsistent with our construction. It seems to show the unskilfulness of the person who wrote the will, rather than the intention of the testator.

There is nothing unnatural or unreasonable in the bequest to Prouty. It is true he was not related to the testator by blood, but he was the son of his wife by a former husband, had long resided in his family, and secured his affection and confidence, as is evidenced by the fact that he made him the trustee of this property for the benefit of his daughter, and of his wife if she chose to reside on the farm with his said daughter, thus casting upon him considerable care and responsibility,—and in this view the bequest seems not only reasonable, but just.

We are not able to discover in the language of the will, or in the

surrounding circumstances, anything that would warrant us in putting the construction upon this clause of the will that is claimed by the counsel for the plaintiff. The intention is apparent that Prouty was to share equally with the said male children, and each of the male children was to share equally with him, and with each other.

The judgment of the county court is affirmed. As both parties excepted and neither has prevailed, neither will take costs in this court.

Result to be certified to the probate court.

WILLIAM F. RICHARDSON *v.* CHARLES SQUIRES.

Statute of Frauds. Contract.

The plaintiff contracted by parol with the defendant for thirty-one sheep, at a stated price, to be delivered as he should want them for butchering. The plaintiff received twenty upon the contract and paid for them when delivered. The defendant refused to deliver the remaining eleven sheep, and the plaintiff brought an action for the damages he sustained in consequence of said refusal. *Held*, that there was both an acceptance and part payment, either of which was sufficient to take the contract out of the statute of frauds, and make it binding upon the parties as an executory contract.

ASSUMPSIT. The case was referred and the facts found by the referee sufficiently appear in the above note and in the opinion of the court. At the April Term, 1864, the court, BARRETT, J., presiding, rendered judgment, *pro forma*, for the plaintiff on the report, —to which the defendant excepted.

Field & Tyler, for the defendant.

G. [redacted] Howe, for the plaintiff.

PIERPOINT, J. The counsel for the defendant have expended considerable labor, and produced many authorities, to show that upon the report of the referee it does not appear that there was any such delivery of the property bargained for, as was necessary to vest the title of the whole number of sheep in the plaintiff, so as to enable him to sue for and recover the value of the sheep which the defendant refused to deliver.

But that is not the question presented by the report. The question for this court to determine is, whether there was such an acceptance, and receiving, of a part of the property purchased, by the purchaser, or such a part payment of the purchase money, as would take the case out of the statute of frauds, (the contract not being in writing,) so as to make it a binding executory contract, and render the party liable in damages who should refuse to perform it.

It appears from the report that of the thirty-one sheep contracted for, the defendant delivered and the plaintiff received twenty upon the contract and paid for them the contract price, at the time they were delivered. The defendant refused to deliver the remaining eleven sheep, and this action is brought by the plaintiff not to recover the value of the eleven sheep, but the damages he sustained in consequence of the defendant's refusal to deliver them.

Here was an acceptance of a part of the property purchased, upon the contract, and a payment of part of the purchase money, either of which was sufficient to take the contract out of the statute, and make it binding upon the parties as an executory contract. It would be difficult to state a case that would be a more perfect example of what is requisite in the way of part performance of a contract of this character, to take it out of the statute, than the present case.

Judgment affirmed.

LYMAN W. JOHNSON, *Administrator of* DANIEL DEXTER, *v.* MARIA DEXTER.

Evidence. Statute.

Where one of the parties to an account dies and his administrator brings an action on book against the other party, the latter cannot, under the provisions of § 24, ch. 36, p. 327, G. S., be a competent witness to testify to a settlement with the intestate of said account. The restriction under said section applies to the party living, whether he be plaintiff or defendant, and though the action was pending, when said section was enacted.

The act of 1864, No. 31, though in form giving construction to said section, can be regarded as having no other effect than to change the law from the passage of the act itself.

Johnson, Adm'r, *v.* Dexter.

BOOK ACCOUNT. The auditor reported that the plaintiff presented an account, and presented and proved the account book of his intestate, and also introduced other testimony tending to sustain a part of the items of said account and rested.

The defendant presented no account on her part, and stated that her defence to the plaintiff's account was that the same had been settled and paid by her in the life time of the intestate, though no evidence of a settlement appeared on his books.

The defendant is the widow of Silas Dexter, and never kept any book of accounts. Daniel and Silas Dexter were brothers, and lived for many years in Wardsboro, on land owned by them in common, and much of their business was carried on in partnership, and their relations were of the most fraternal and confidential kind. Silas died in 1850, leaving the defendant, his widow, with a family of young children, in rather straitened circumstances. Daniel assisted the defendant in the settlement of her husband's estate, and after that till his own death in 1862, acted as her friend, adviser and assistant, in all her affairs, carrying on the common land which remained undivided and accounting to her for her share of the profits, and the greatest trust and confidence existed between them. The plaintiff's account extends from April, 1851, to April, 1857. The defendant offered herself as a witness, to prove that she had had repeated settlements with the intestate, the last of which was subsequent to the last of the charges in the plaintiff's account, and that said account was wholly paid. To the admission of the defendant as a witness for such purpose, the plaintiff objected, but she was admitted, to which the plaintiff excepted.

The auditor finds mainly, on the testimony of the defendant, that the intestate and defendant were in the habit of settling from time to time, the defendant thereupon paying to him what was due, and that the whole account presented was settled and paid. No receipts ever passed between the parties owing to the mutual trust and confidence existing between them. The defendant did not know that the intestate ever entered any charge against her, on his book, and such charges were in fact intended by the intestate simply as memoranda to assist his memory in settling with the defendant, and his omission to note the several settlements on his book was mere

negligence arising from the same confidential relations between them. This suit was commened in March, 1863, and trial before the auditor November 11th, 1863.

On the foregoing report the court, at the April Term, 1864, BARRETT, J., presiding, rendered judgment, *pro forma*, for the defendant to recover her costs,—to which the plaintiff excepted.

A. Stoddard, for the plaintiff.

Charles N. Davenport, for the defendant.

POLAND, Ch. J. We have entertained great doubts whether the question which has been argued before us, is really so raised by the exceptions that we ought to consider it. The exception taken in the county court, was to the rendition of a judgment by the court upon the report of the auditor. Properly that judgment must be treated as founded upon the facts which the auditor has found and reported, and no question is made but those facts would support the judgment which the court rendered. Where the real objection is that the referee or auditor allowed improper testimony to be introduced before him, the attention of the county court should be called to it by a special exception, or a motion to recommit, and if instead of that the party goes to a hearing upon the facts found, he must be understood as waiving all objection to the testimony introduced. Although improper evidence may have been allowed, the party may be satisfied that the finding of facts is as favorable as he could hope for on another hearing, and therefore may not desire to have the case retried by the referee or auditor. In such a case it would be manifestly unjust to allow a party when his case gets into the supreme court, to raise an objection of this preliminary and interlocutory character.

In an ordinary case we should listen to no such question in the supreme court, unless the record showed affirmatively that it was insisted on in the county court, and determined against the excepting party.

But in the present case the report shows no other question whatever, about which there could have been any question in the county court, and the counsel have not made any question but that the question raised and decided below was as to the admissibility of the defendant as a witness, so that we infer the exceptions would be

amended by the judge who decided the case, and therefore we have decided to consider it to be properly here.

Was the defendant properly allowed to testify to the settlements she had made with the plaintiff's intestate of his accounts in his lifetime? We think she was not. The other party to the cause of action was dead, and the action was prosecuted by his representative. The settlements and payments she testified to were not made with any person living who could testify, nor made since the plaintiff was appointed administrator, nor was her testimony to prove the handwriting of her charges, or when they were made, which are the only exceptions to the exclusion of one party as a witness when the other party to the cause of action is dead or insane.

Strictly and grammatically construed, the living party in an action on book account, would not be entitled to the benefit of the exceptions from the exclusion named in the first proviso, and could only testify to the handwriting of his charges and when they were made. This subject was before the court on the present circuit in Rutland county, and after a careful consideration it was held that taking the whole statute together, with the history of the legislation on this point, the true intent and meaning was, not to exclude parties on book from testifying in the excepted cases mentioned in the first proviso, but to allow them that right, and the further right to testify to their own charges as stated in the second proviso.

These two provisos are to some extent dependent upon each other, and the language of the first proviso must be understood as incorporated into, or referred to in the second. The second one says nothing expressly about one party to the contract or cause of action being dead, but it clearly has reference to the commencement of the first, which says, "when one of the original parties is dead, or insane, the other party shall not be admitted, &c.," and the words used in the second, "*party living*," show clearly that all the exceptions of both provisos were to apply in cases where the other party was dead or insane.

The general purpose of the provisos is entirely apparent; to exclude one party from being a witness when the other was dead and could not be, with certain exceptions, not within the general supposed mischief, and of supposed necessity, when the facts were

peculiarly within the knowledge of the party living. It is not claimed by the defendant but that it was fairly within the power of the legislature to prohibit a party from testifying in a case, where by the previous law he could testify, and the action pending at the time of the passage of the prohibitory law; and there does not seem any good ground to deny the power, as it is merely changing the course of proceeding and a rule of evidence, which are regarded as belonging to the class of legal remedies, and not of legal vested rights, although such change may have an important influence upon the rights of the parties. The propriety and wisdom of such change affecting suits already pending, and transactions already passed, admit of much more doubt.

But the defendant claims that by the true construction of the second proviso, she was properly admitted to testify to the settlements between her and the intestate; that the second proviso was only intended to limit the testimony of the living party in an action of book account to cases where such party is claimant against the estate, or representative of a deceased party, and to leave such party the right to testify fully as to all matters of defence to a claim made against him by such representative or estate. But the language of the whole section is too plainly otherwise to allow us to entertain such construction, however great the apparent hardship may be in the particular case, or class of cases.

The language used, "where one of the original parties shall be dead, the other shall not be admitted, &c.," clearly shows that the restriction was intended to apply equally to one party as well as the other, and whether the party deceased was plaintiff or defendant, and that the living party was to be precluded from testifying, except to the extent of the exceptions, equally, whether prosecuting a claim against a deceased party, or defending against a claim in favor of the party deceased.

It is easy to perceive how unfairly it may operate, in case of a claim on book prosecuted in favor of an estate, but this cannot vary the express language of the statute, it only shows the danger of meddling with settled rules of law and course of legal proceedings, and how far short legal reformers frequently come of their aims, in

endeavoring to make the operation of the law more just and equal than before, by legislative change.

The act of 1864, though in form giving a construction to this section of the general statutes, can be regarded as having no other effect than to change the law from the passage of the act itself, and probably was not supposed by the framers, to have any greater effect.

By that act the defendant would now be a legal witness upon another trial to the very facts she testified to before, and we have entertained doubts whether we ought to reverse the judgment, because she was improperly admitted before, when on another trial the plaintiff would have her evidence again to encounter. But on consideration, we think it would not be consistent with our legal duty to take such course, and regard this as an error which could not have prejudiced the plaintiff. He might have relied on her not being admitted, as he had the right to, and not have prepared himself with evidence to contradict and overcome her testimony, which he may do on another trial. There are cases in our reports, where the court have said, that though there had been an error committed on the former trial, they would not reverse the judgment and grant a new trial, because it was apparent that it could be of no benefit to the party asking it. But those were cases, where there was some positive legal impediment in the way of the party's ever prevailing, so that the court could say with legal certainty the party was not prejudiced. As a matter of fact it will very likely turn out that a new trial will be of very little service to this plaintiff; it would rather seem that it ought not to, but we cannot say he is not legally entitled to it.

Judgment reversed and case remanded.

EPHRAIM PERSON, *Administrator of* CHARLES H. PERSON, *v.* DANIEL CHASE, *Appellant.*

Infancy. Emancipation.

An absolute gift of articles of personal property made by an infant, can be revoked or avoided by him, or by his administrator.

Emancipation of an infant by his father does not enlarge or affect his capacity to make a contract.

TROVER for several articles of personal chattels. Plea, not guilty. Trial by jury, April Term, 1864.

It appeared on trial that the plaintiff's minor son Charles, the intestate, made some presents to the defendant's minor daughter Fanny, a young lady to whom the intestate was engaged to be married at the time of and previous to his death; that these presents were made when he went away into the army; that he made the said Fanny his agent to draw his pay as a soldier, and to pay what he was owing, and otherwise control said money; that his estate was owing nothing; that his father had previously emancipated him; and that the defendant refused to deliver up the articles when demanded of him by the plaintiff.

The only question submitted to the jury was whether said Charles gave by absolute gift said articles, as the defendant's evidence tended to show. No question was made as to the conversion, in case the plaintiff was entitled to demand and recover said articles. The plaintiff requested the court to hold and charge as matter of law, that Charles, being a minor, could not, though emancipated by his father, make a valid, absolute gift of said property, so as to preclude the plaintiff as his administrator from the right to demand and recover said articles.

The court, BARRETT, J., presiding, declined so to charge, and did charge the jury that if they should find from the evidence that Charles gave by absolute gift said articles to Fanny, as the defendant's evidence tended to show, the plaintiff was not, upon the evidence and facts proved in the case, entiled to recover. To this part of the charge the plaintiff excepted; verdict for the defendant.

Butler & Wheeler, for the plaintiff.

Charles N. Davenport, for the defendant.

Person, Adm'r, v. Chase.

KELLOGG, J. The question in this case is, whether an absolute gift of articles of personal property made by an infant can be revoked or avoided by him, or by his administrator as his legal personal representative. There is a recognized distinction between those acts of an infant which are *voidable* and those which are *void;* but these terms have been not unfrequently used in statutes, decisions, text books, and contracts in an ambiguous or indefinite sense, and without any regard to strict precision of meaning. The application and import of these terms were very fully considered in *State* v. *Richmond*, 26 N. H., (6 Foster), 232, and in *Pearsoll* v. *Chapin*, 44 Penn. St. R. 9. In *Williams* v. *Moore*, 11 M. & W. 256, Baron PARKE recognizes this indefinite use of the term *void*, and clearly defines its application to the acts and contracts of infants, by saying that an infant's contracts are *void* if by *void* is meant *incapable of being enforced against him;* but that if by *void* is meant *incapable of being ratified*, then they are not *void*. The tendency of modern decisions is to hold the acts, deeds, and contracts of an infant as *voidable* merely. Bingham on Infancy, ch. 2; *Bigelow* v. *Kinney*, 3 Vt. 358; 2 Kent's Com. 234, *et seq.;* 1 Am. Lead. Cases, (4th ed.), 244, *et seq.*

The rules of law as to infants are made for their protection, and this has been the chief consideration which has been regarded in the adjudged cases in determining the legal character of their acts.

The general principle is, that the infant shall be bound by no contract except for necessaries, and that all other contracts are voidable or confirmable by him at his election; and the law makes no distinction between contracts *executed* and those *not executed* as to their being voidable. *Abell* v. *Warren*, 4 Vt. 149; *Price* v. *Furman*, 27 Vt. 268. Judge REEVE, in his treatise on Domestic Relations, (p. 254,) refers approvingly to a case reported in Keble, showing that if the infant's privilege will not be sufficiently protected by considering his contracts as *voidable*, they will be held *void*. In that case, (*Scroggam* v. *Stewardson*, 3 Keble, 369,) a barber contracted with an infant "above sixteen years old" for the hair growing on her head, "for sixpence in hand paid," and in pursuance of the contract, with the license of the infant, cut all the hair from her head. It was apparent that no way was left to her to avail herself of her privilege without considering the contract as void. She accordingly

brought an action against him for a trespass in forcibly cutting off the hair from her head, and recovered,—the court (of which Lord HALE was the chief justice,) saying that "the infant could not license, though she might agree with the barber to be trimmed." In *Carpe* v. *Overton*, 10 Bing. 252, (25 E. C. L. R. 121,) it was held that the plaintiff might recover back, in an action for money had and received, a sum which, while an infant, he had paid in advance towards the purchase of a share in the defendant's trade, to be retained by the defendant as a forfeiture if the plaintiff failed to fulfill an agreement to enter into partnership with the defendant,—the plaintiff not having actually received any profit or benefit from the business; and the doctrine is now well settled, that when a contract is avoided by an infant, he may recover back whatever he has paid or delivered on it. *Price* v. *Furman*, *ubi supra*, in which case the right or privilege of infants to avoid their contracts, and the consequences resulting therefrom, are very fully considered and stated.

If an infant cannot trade, nor bind himself by any contract in relation to trade,—if he can neither purchase, nor sell, nor dispose of property, so as to bind himself,—*a fortiori* he cannot bind himself by a gift of his property, even though accompanied by a manual delivery. If the rule was otherwise, the protection which the law extends to him would be completely eluded. Under the laws of this state, (G. S., p. 377, § 4,) an infant cannot make a testamentary disposition of personal estate; and it would be singular if he should be held competent to make a valid and binding disposition of such property by an executed or executory gift in his lifetime, although clearly incompetent to make any disposition of it by a last will and testament. An infant has no more capacity to dispose of his property by *gift* than he has by *contract*, and it is as essential that he should be protected from the consequences of an improvident gift of his property as it is that he should be protected from the consequences of an improvident contract in respect to it. The emancipation of the infant by his father did not enlarge or affect his capacity to make a contract, and its only effect was to release him from his father's control, and to give to him a right, as against his father, to his earnings. *Taunton* v. *Plymouth*, 15 Mass. 203; *Kent* v. *Osgood*, 19 Pick. 572.

The privilege of an infant to avoid his acts or contracts is his personal privilege; but it is well settled that, after his death, this privilege extends to his legal personal representatives. Thus, the infancy of a testator is a good plea by an executor to an action on a promissory note made by the testator. *Hussey et al.* v. *Jewett, Ex'r*, 9 Mass. 100; 2 Kent's Com. 236–7; *Jefford* v. *Ringgold*, 6 Ala. 544; *Parsons* v. *Hill*, 8 Mo. 135. If the plaintiff as the administrator of the estate of his deceased son, who was the infant in this case, could effectually avoid or revoke gifts of articles of personal property made by the son in his lifetime, it is clear that a demand of the articles by the plaintiff as such administrator of a party who was in possession of them was a sufficient act of avoidance or revocation of the gift; and no question was made on the trial as to a conversion by the defendant of the articles in controversy in case the plaintiff was entitled as the legal personal representative of his son to demand and recover for them.

These conclusions lead to a reversal of the judgment of the county court and to a new trial in the cause. But, while we are not at liberty to recede from the established rules of law applicable to the subject matter of this litigation, we are not insensible to the impressions of the plaintiff's case which the facts stated in the bill of exceptions, and necessarily found by the jury under the charge of the court, are calculated to produce. We can heartily and without reservation apply to those facts the spirit and sentiment of the language used by Hyde, J., more than two hundred years ago, in delivering his opinion in the Exchequer Chamber in the celebrated leading case of *Manby* v. *Scott*, (reported in 1 Mod. 124,) on the subject of the husband's liability for debts contracted by the wife for necessaries when living separate and apart from him, and say that "this case is the meanest that ever received resolution in this place, but as the same is now handled, it is of as great consequence to all the king's people of this realm as any case can be."

Judgment of the county court for the defendant reversed, and a new trial ordered.

GEORGE W. GRAVES *v.* CHARLES W. SEVERENS.

Pleading. Trover. Trustee Process.

In an action *ex delicto* the writ, after the declaration, proceeded in the usual form of a summons to a trustee named, and was served on the defendant as an attachment, but no service was made, or attempted to be made, on the trustee. *Held*, that the addition of the trustee part was no sufficient ground for a dismissal of the suit, that part of the writ being regarded as mere surplusage.

A suit is not regarded as "commenced by trustee process," unless that process is used to bring the trustee into court as a party to the suit.

TRESPASS ON THE CASE. After the declaration the writ proceeded in the usual form of a summons to Joseph Smith, trustee, &c. It was served upon the principal defendant as an attachment, but no service was made, or attempted to be made, on the trustee.

Upon motion of the defendant's counsel to dismiss the suit, on the ground that the action was *ex delicto* and was commenced by trustee process, the court at the April Term, 1864, BARRETT, J., presiding, *pro forma* sustained the motion, and adjudged that the suit be dismissed,—to which the plaintiff excepted.

J. D. Bridgman and *H. E. Stoughton*, for the plaintiff.

C. B. Eddy, for the defendant.

KELLOGG, J. We have no doubt that this action is, both in form and substance, an action *ex delicto*, and that, as it is not an action "founded on any contract," it could not be "commenced by the trustee process," under the provisions of the statute. (G. S., p. 305, § 1.) The writ was served on the defendant as an ordinary writ of attachment, but no service was made, or attempted to be made, on the trustee named in it. We do not think that a suit should be regarded as "commenced by the trustee process," unless that process is used to bring the trustee into court as a party to the suit. No service having been made on the trustee in this case, he was not a party to the suit, and no trustee process against him could be considered as pending in court. That part of the plaintiff's writ in respect to the trustee should, consequently, be treated as being merely surplusage; and, as such, it may properly be rejected or stricken out. The case is unlike that of *Ferris* v. *Ferris & Trustee*, 25 Vt. 100, because, in that case, the trustee process was used by service thereof

on the trustee. It has been held in this court that a writ of attachment, if served as a writ of summons, will operate as such, and be sufficient to hold the defendant to bail, although these writs are different in form, and are recognized in the statute as distinct precepts; and it has also been held that a writ which improperly issues as an attachment against the body of the defendant, but which is served as a writ of summons or by attachment of property only, is not for that cause abatable. *Brewer et al.* v. *Story et al.*, 2 Vt. 281; *Langdon* v. *Dyer*, 13 Vt. 273; *Bowman* v. *Stowell et al.*, 21 Vt. 309.

Judgment of the county court (by which the suit was, *pro forma*, dismissed,) reversed, and the defendant's motion to dismiss overruled, and the case remanded to the county court for further proceedings.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF WINDSOR,

AT THE

FEBRUARY TERM, 1865.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE.

HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. ASAHEL PECK,
} ASSISTANT JUDGES.

RUFUS BUCK *v.* LUTHER GILSON AND OTHERS.

Trespass. Husband and Wife.

The mere fact that a husband signed a note with his wife, given for money to pay in part for land deeded to the wife, when it does not appear that any reliance was, or could be placed upon his paying it, and the note was secured wholly by mortgage of her lands, and those of her relatives, is not enough to show that he had any real or equitable interest in the premises that could be taken by his creditors.

If a party having recovered judgment against another, levy execution upon land deeded to his wife, the husband never having held the title, the former would not by his levy acquire a legal title so that he could maintain ejectment or trespass *qu. cl.* upon it, whatever interest the husband may have had in the land, or whatever design in having the wife hold the title.

Buck v. Gilson et al.

TRESPASS *quare clausum* and for a quantity of hay. Plea, the general issue. Trial by the court, December Term, 1864, BARRETT, J., presiding.

The farm or close named in the declaration, on which the grass or hay sued for grew, was deeded to Lemira Gilson, the wife of the defendant Luther Gilson, by W. S. A. Morse, by deed dated April 6th, 1850. At the time of this conveyance there was a mortgage upon the farm of about $600., and the said Lemira took the deed subject thereto. The sum of $535. was hired of one Sarah Rice to pay towards the purchase of said farm, and Lemira and Luther Gilson executed their note therefor, and joined in executing a mortgage of said farm, and also with a brother and step-mother of said Lemira, joined in executing a mortgage deed of a small house and lot, the property or estate of the father of Lemira, then deceased, whose estate was then in a course of settlement; all of which was to secure the payment of the $535. to the said Sarah Rice. The said small house and lot was then worth about $350. Luther Gilson, the husband of Lemira, never had any legal title to said premises, nor did he ever pay anything towards the purchase money. Soon after the purchase of said farm Luther and Lemira Gilson moved on to and carried on the same, and have continued to do so to the present time. October 6th, A. D. 1851, the plaintiff recovered a legal judgment against the said Luther Gilson for $44.66 damages, and $4.75 costs of suit, and execution was issued thereon December 29th, 1851, which was duly levied on said farm in satisfaction therefor, and the return thereof duly recorded. August 1st, 1852, the plaintiff entered upon said farm and mowed a quantity of grass growing thereon, which the defendant and his men raked up and converted to the defendant's use, for which this suit is brought.

The county court rendered judgment for the defendant,—to which the plaintiff excepted.

S. Fullam, for the plaintiff.

J. F. Deane and *L. Adams*, for the defendants.

POLAND, Ch. J. In order to enable the plaintiff to maintain this action of trespass *quare clausum*, he must have a title to the premises upon which the alleged trespass was committed, and his title to the hay sued for depended upon his title to the land.

The plaintiff claimed title by virtue of levy of execution in his favor against the defendant upon the land. If the defendant was the owner of the land, the levy, which is conceded to be regular in form, conveyed his title to the plaintiff.

If the land belonged to the defendant's wife, and the defendant's only interest was that of a husband in his wife's land, then it was not liable to attachment or levy by his creditors, and no title was derived by the plaintiff from his levy thereon for the debt of the husband.

The land was conveyed solely to the wife, so that the legal title was in her, and not in the husband. But the plaintiff claims that the defendant in fact had an interest in the land, because he was legally holden for the payment of the note given for the $535. borrowed to make payment for it. The agreed case shows that he signed the note with his wife for the money so obtained, and joined with his wife in a mortgage deed of the premises in question, and also in a mortgage with her and her brother and step-mother of certain other premises, to secure the payment of the note.

His joining in the mortgage of these premises with his wife, has no tendency to show any interest or claim of interest in them in him, as his wife could not make a valid mortgage without joining her husband.

The fact that he signed the note with her, we think has very little tendency to show that it was expected he would pay it, or that any reliance was placed upon the security of his name. The party loaning the money might have supposed that it was necessary to have his name to the note as well as to the mortgage. The fact that the payment of the note was wholly secured by mortgage of these premises, the title to which was in the wife alone, and of other premises belonging wholly to the wife and her relatives, in which the husband had no interest, shows quite clearly that it was regarded as a transaction of the wife, and not one for the benefit of the husband, and that it was not expected he would pay the note, or have any interest in the premises.

He had paid nothing whatever toward the premises, and the mere fact that his name was on the note given for money to pay in part for the land, when it does not appear that any reliance was, or could

be placed upon him, and the note was secured wholly by mortgage of her lands, and those of her relatives, is not enough to show that he had any real or equitable interest in the premises, that could be taken by his creditors.

But if this were otherwise, and it were shown that he paid the whole consideration, and the deed was taken to his wife for the purpose of keeping it out of the reach of his creditors, the plaintiff did not by his levy acquire the legal title, so that he could maintain either ejectment or trespass, *quare clausum*, upon it. If the defendant was the real owner of the land, and the title held by his wife was merely in trust for him, his interest was liable to be taken by his creditors by levy. But a levy and set-off of his equitable estate would convey to the creditor only the equitable estate, and the proper course must be taken to obtain the legal title, before an action at law can be supported upon the title. As the legal title was never in the defendant, the case stands differently from what it would, if the defendant had once been the legal owner, and had conveyed it away in fraud of his creditors. In such case the creditors may treat the deed from him as void, and the legal title as remaining in him. As the legal title was never in the defendant, if the deed to his wife was merely in trust for him, and was made so fraudulently as to his creditors, it could not have the effect to convey the legal title to the defendant. This was expressly held in *Dewey et al.* v. *Long*, 25 Vt. 564.

These views of the case render it unnecessary to decide as to the effect of the plaintiff's entry upon the defendants' possession and cutting the grass.

Judgment affirmed.

THE STATE OF VERMONT *v.* RUFUS BUCK.

Intoxicating Liquor. Agency. Evidence.

If a merchant does not keep intoxicating liquor for sale at his store, but makes himself an agent and carrier merely, to procure it for division and distribution among his customers, he is guilty of a violation of the statute prohibiting the sale of intoxicating liquors.

Under a complaint for selling liquor the state or respondent may show any conversation that took place between the latter and the buyer pertaining to the transaction at the time of it.

INDICTMENT for violations of the statute prohibiting traffic in intoxicating drinks. Plea, not guilty. Trial by jury, May Term, 1864, BARRETT, J., presiding.

Upon the evidence the jury found the respondent guilty of nineteen offences. Some ten or twelve witnesses were called in behalf of the prosecution and testified, among whom was Allen Green, who testified as follows: "I don't recollect of buying any liquor of the respondent, nor of sending to his store for any. He delivered to me a gallon of liquor. I sent by him for it and paid for it. Don't recollect of having any liquor there more than once." Also, John Hardy, who testified as follows: "I sent by the respondent to get some liquor,—wanted some for haying. He said a number wanted some. I went with a jug, and got a gallon or two gallons. He took the jug and went out and got it. I don't recollect whether I paid him for it before he sent or after." The witnesses fixed the time of these transactions within three years. The respondent's counsel insisted that the testimony of said two witnesses did not tend to show any offences against said statute. The court held that it did, and instructed the jury that it was proper to be considered by them.

To this the respondent excepted. No other exception was taken to the charge.

It was proved that the respondent kept a store in South Reading village, at which all the liquor testified about by the witnesses was obtained.

S. Fullam, for the respondent.

Charles P. Marsh, State's Attorney, for the state.

POLAND, Ch. J. The testimony of the two witnesses, Green and

Hardy, was properly admitted and properly submitted to the jury as tending to prove violations of the statute against unlawful traffic in ardent spirits.

1st. The testimony of these witnesses tended to prove a sale of liquor by the defendant. They procured the liquor of the defendant at his place of business, and paid him for it. These were all the facts they testified to, and *prima facie*, this was a sale of the liquor by the defendant to them. All that they said about the defendant's sending for the liquor and procuring it for them as their agent, seems to have been mere talk; they knew nothing in relation to its being sent for, or procured for them by the defendant, and for aught they knew it was the defendant's liquor they received. As this conversation accompanied the transaction of obtaining the liquor, the defendant had the right to have it received and weighed, as tending to qualify and give character to the act. But the jury might have been satisfied from the evidence of these witnesses, or other evidence or circumstances appearing in the case, that this talk about sending for the liquor for them, and acting as their agent, was all a mere pretence and sham, got up for the purpose of covering up and concealing a real sale of the defendant's own liquor. The court did not instruct the jury that the evidence of each of these witnesses, or both of them, if believed, proved an offence against the law, but only that it had a legal tendency in that direction, and was proper for them to consider.

2d. If the jury believed that the defendant was acting as the agent of these witnesses in sending for, and procuring liquor for them, then the evidence tended to prove a case of furnishing, by bringing or transporting intoxicating liquors "to be divided among, or distributed to others." Hardy testified that when he sent by the defendant to get liquor for him, the defendant said "a number wanted some."

The exceptions show that all the witnesses who testified to procuring liquor of the defendant, obtained it at his store,—his place of business.

Now if it were true that the defendant did not keep liquors for sale at his store, but made himself an agent and carrier merely, to procure it for division and distribution among his customers, this was equally a violation of the statute.

In either of the above views the evidence was proper to be submitted to the jury, and as no exception was taken to the charge, we are to assume that it was submitted with all proper explanation and limitation.

The defendant's exceptions are therefore overruled.

SEWALL FULLAM *v.* LEVI IVES.

Costs. Practice.

It seems that where a suit is discontinued before the return day, and no costs have been incurred by the defendant before receiving *verbal* notice of the discontinuance, the question whether he may come in and have judgment for costs is one resting wholly in the discretion of the court.

This discretion was properly exercised in this case, the plaintiffs, both nominal and real, having sent the notice by the defendant's daughter, which she delivered to the defendant, who was himself an attorney.

COMPLAINT FOR COSTS. It was proved that a writ in the name of said Ives, as plaintiff, against said Fullam, returnable to the May Term, 1864, of Windsor County Court, was duly served on said Fullam; that said suit was not entered in court; that Fullam in the course of the week next preceding said May Term was verbally notified that the suit would not be entered, and that it was dropped; that Fullam is an attorney and accustomed to attend regularly the terms of the county court in Windsor County. The only question was whether *verbal* notice was sufficient.

Upon these facts the court, at the December Term, 1864, BARRETT, J., presiding, rendered judgment that said complaint be dismissed with costs,—to which the complainant excepted.

Sewall Fullam, for the complainant.

Frederick C. Robbins for the defendant.

POLAND, Ch. J. The statute provides that, "if any person shall cause process to be served on another for any matter or cause, and discontinue his suit, or be non-suit therein, or when such suit shall be abated and dismissed for want of jurisdiction, the court to which

such process is made returnable shall give judgment for the defendant to recover reasonable costs." G. S. 267, § 42. In *Griffin* v. *Farwell*, 20 Vt. 153, it was said by HALL, J., "By the terms of this statute it would seem to have reference to the withdrawal of a suit, after it has been entered in court. But by an equitable construction, a defendant, where the process has not been returned, has, in the supreme and county courts, been allowed on complaint and filing a copy, to have judgment for his costs." The term *reasonable costs*, used in the statute, must be construed to cover such costs as have already accrued to the defendant when the suit was discontinued, and such as the party is reasonably compelled to make afterwards to secure and protect his just rights. In *Mead* v. *Arms*, 2 Vt. 180, it was decided that where a plaintiff discontinued his suit before the return day, and gave the defendant a written notice of such discontinuance, that the defendant was not entitled to file his complaint and obtain a judgment for costs. It was said in that case that if the defendant had already incurred costs before notice of discontinuance, such costs must be paid or tendered to him, or else he would be entitled to come in and claim a judgment for costs.

We are now called upon to decide, that in every case where a suit is discontinued before the return day, and where no costs have been incurred by the defendant before receiving notice of such discontinuance, the defendant is entitled to come in and claim a judgment for costs, unless such notice was in writing; and to make this a rule of strict legal right, without reference to whether such claim is reasonable, or unreasonable.

In *Hill* v. *Dunlap*, 15 Vt. 645, it was decided that where verbal notice of the discontinuance of a suit was given, before the commencement of another suit for the same cause of action, the former suit was ended, and furnished no reason for abating the second.

In giving the opinion in that case, REDFIELD, J., said the only necessity for a notice in writing of a discontinuance was to prevent the defendant from making a claim for costs, and that if such notice was verbal only, it was wholly within the discretion of the court whether to give the defendant costs or not. It is said that this was not a point in judgment in that case, and therefore not authority, but we think it may fairly be said to be evidence of the then opinion

of the court; at least it is evidence of the opinion of one long familiar with the course of legal practice and decision in our courts, and entitled to consideration.

In *Clark* v. *Scofield*, 16 Vt. 699, the plaintiff brought a suit against the defendant, but after the service of the writ, the defendant filed his petition in bankruptcy, and was declared a bankrupt. The plaintiff did not enter his suit and the defendant entered his complaint for costs; no notice whatever had been given him of the discontinuance. The county court refused to allow costs to the defendant, and that judgment was affirmed in the supreme court. The reason given was, that the defendant, after doing an act himself which would constitute a defence to the action, could have had no reasonable ground to suppose the plaintiff would enter and prosecute his suit.

Since the decision in *Mead* v. *Arms*, it has been considered settled that where written notice of a discontinuance of a suit is given, and no costs have then accrued, the defendant has no right to come in and claim costs, and the general practice in such cases has been to give notice in writing. This is certainly the safer and more advisable course, and the only one that can insure the plaintiff against the payment of costs to the defendant, if he comes in and claims costs.

It has to some extent been supposed that the case of *Mead* v. *Arms* decided correlatively that unless the notice was in writing, the defendant was entitled to costs as a matter of strict right. But the case does not decide this, and this view of its force has by no means been the universal, or even general understanding of the profession. The argument in favor of this strict and absolute requirement of a notice in writing is that the defendant may not be safe in acting upon a verbal notice, that if he stays away from court the plaintiff may enter his suit and take a judgment by default. But the plaintiff may do precisely the same if his notice is in writing. It is not claimed but that a judgment thus obtained, after a notice of discontinuance in either mode, would be set aside upon *audita querela*, but it is said that the party in the one case has better and more reliable evidence than in the other. But this depends much upon the manner in which the verbal notice is given, and the means of proving it. If such a fraud is practised it is immediately known, and is not like a

case where a party may need to preserve his evidence to meet a claim that may arise years afterwards. The objection we think is more fanciful than real. The true rule we think is that stated by Judge REDFIELD, that in such case, it rests wholly in the discretion of the court whether to allow costs.

If the notice was so given that apparently the defendant could have had any fair reason to believe that it would not be acted upon by the plaintiff, or was not given with such authenticity, or publicity, that the defendant could make it available, then he should be allowed to appear and see whether the suit was discontinued, and be allowed his costs. On the other hand if the notice is such that the defendant has reason to suppose it given in good faith, and is given in such a direct and authentic manner, as to render it apparent that he could have had no reasonable doubt of his safety in acting upon it, and where his conduct in coming in to claim costs is evidently a mere wanton attempt to get a bill of costs out of the plaintiff, he should not only not be allowed costs, but made to pay the costs of the plaintiff made in opposition to his claim.

The decision in *Clark* v. *Scofield*, we think cannot be supported on any other ground. The plaintiff had not discontinued his suit nor given any notice that he should do so. Notwithstanding the defendant had been declared a bankrupt, the plaintiff might rely upon showing some defect or irregularity in his proceedings to avoid its effect. The defendant might very well say that as he had no notice the suit would not be prosecuted, he had a right to suppose he intended to do so. If the plaintiff had entered his suit and taken a judgment against the defendant, after his decree in bankruptcy, it would be no defence to the judgment, and it is difficult to see what remedy the defendant could have had, except by some application to the discretion of the court to take off the default. It seems a much stronger case than an actual discontinuance with verbal notice to the defendant, which all admit would be good ground for setting aside a judgment, if one should be taken.

These views we believe have generally been acted upon by our courts in such cases, though perhaps not universally, and we think this the safer and more practicable rule, and more likely to produce exact justice.

If as we think this was a matter of discretion, in the county court, we have no right to revise it, but the discretion seems to have been properly exercised in this case. The defendant had notice from both the nominal, and real plaintiff, and it was given in such manner, that he could not well doubt its authenticity or good faith. His own professional employment made it necessary for him to attend court, and he knew the case had not been entered in court, before he made his complaint for costs. His attempt thus to get a bill of costs from the plaintiff was very far from reasonable, and was justly denied.

Exceptions dismissed with costs.

NOTE.—The other cases heard at the present term will appear in the next volume of Reports.

APPENDIX.

OPINION OF THE JUDGES OF THE SUPREME COURT

ON THE

CONSTITUTIONALITY

OF

"AN ACT PROVIDING FOR SOLDIERS VOTING"

The General Assembly of the state of Vermont in session at Montpelier in 1863 passed "AN ACT PROVIDING FOR SOLDIERS VOTING," which was approved by the Governor, November 11th, 1863. (Laws of 1863, No. 5.)

The 12th section of the act provides that "this act shall not take effect until the Governor submits the same to the Judges of the Supreme Court, with the inquiry, 'Are the provisions of this act constitutional?' and until the Governor has obtained in writing the opinion of said Judges thereon; and if the said Judges decide that the provisions of the act, or certain parts thereof, are unconstitutional, then the same, or such parts thereof as said Judges shall decide are unconstitutional, shall be null and void, and the residue thereof shall remain in full force and virtue."

In pursuance of said section, the act was submitted to the Judges of the Supreme Court in January, 1864, by the Governor, with the inquiry, "Are the provisions of this act constitutional?" and in reply thereto they gave in writing their opinion that the provisions of

said act providing for soldiers voting for the following officers, viz: governor, lieutenant governor, and treasurer, are unconstitutional; and that the provisions of said act providing for soldiers voting for members of congress and electors of president and vice president of the United States are constitutional. The opinion of the court was drawn up by POLAND, Ch. J., and was furnished to the Reporter in *pamphlet*, as published at St. Albans in 1864.

To His Excellency:

JOHN GREGORY SMITH,

Governor of Vermont.

Your communication, requiring the opinion of the Judges of the Supreme Court upon the constitutionality of "An act providing for soldiers voting," was received in January last, but the constant engagement of all the members of the Court on the winter circuit, from that time until within a few days, has prevented them from giving the subject that examination and attention which its importance demands, at an earlier day, and delayed our answer to the present time. The act provides generally for taking the votes of all qualified electors of this state in the volunteer military service of the United States wherever they may be, within or without the state, on the days provided by law, for the election of governor, lieutenant governor, and treasurer of the state, and for members of congress, and electors of president and vice president.

The act contains various provisions as to the manner of voting, intended to secure fairness, and prevent fraud or mistake, and then provides that the ballots thus taken, and the voting lists, required to be kept by the officers presiding at such elections, shall be returned to the secretary of state, who shall return said votes to the General Assembly, to be counted with the votes cast in the state for the same officers.

The single question submitted to the Judges, as we understand it, is, as to the constitutional power of the legislature to authorize the taking of votes without the state, for the officers named in the act. Our examination, therefore, has been, and our answer will be, strictly confined to that. If the legislature can constitutionally authorize votes to be taken without the state, the means or machinery by which it is to be effectuated, must necessarily be mainly within the judg-

ment and discretion of the framers of the law, and any objection to such means could hardly rise to the dignity of a constitutional question.

Nor do we understand that any question is, or can be made, as to the right of any *freeman* of this state, who has volunteered into the military service of the United States, to give his vote within the state. The absence of such persons from the state, in such service, is not a removal, or change of residence, by which the right of voting is lost, but like an absence from the state upon a journey, or business, is of a temporary character, and the *domicil*, or *residence*, continues within the state, while the person is actually without the state. The question is narrowed, therefore, to the point, whether the constitution requires the votes by which the officers named in this act are elected, to be given *within this state?*

Several states have passed laws similar to the act in question, which have been before their respective courts for examination, and, in all, it has been either expressly or tacitly conceded, that unless some constitutional restriction required the voting to be within the state, it was perfectly competent for the legislature to provide that persons legally entitled to vote in the state, might cast their votes at some place without the state, and be counted in the election. We proceed, therefore, to consider the question, in the first place, as to the state officers named in the act, governor, lieutenant governor, and treasurer.

The first provision in the constitution of this state in reference to elections, is of representatives to the General Assembly.

Sec. 7, of part the second, is as follows:—"In order that the freemen of this state might enjoy the benefit of election as equally as may be, each town within this state that consists, or may consist, of eighty taxable inhabitants, within one septenary, or seven years, next after establishing this constitution, may hold elections *therein*, and choose each two representatives; and each other inhabited town in this state, may, in like manner, choose one representative, to represent them in the general assembly, during the septenary, or seven years; and after that, each inhabited town may, in like manner, hold such election, and choose one representative, forever thereafter."

Sec. 8, of part second, provides that representatives shall be chosen

by ballot by the freemen of every town in this state on the first Tuesday in September annually forever.

It is conceded, as we understand, that under the above provisions of the constitution, the meetings of the freemen for the election of representatives to the state legislature, must be held within the town, and that it would not be within the constitutional power of the legislature to provide for their being holden elsewhere, or that votes given elsewhere than in such meeting, could be received. Hence, the act in question does not provide for taking the votes of the soldiers from this state, for town representatives. Sec. 10, part 2, is as follows:—"The freemen of each town shall, on the day of election for choosing representatives to attend the general assembly, bring in their votes for governor, with his name fairly written, to the constable, who shall seal them up, and write on them 'Votes for Governor,' and deliver them to the representative chosen to attend the general assembly. And at the opening of the general assembly there shall be a committee appointed out of the assembly, who, after being duly sworn to the faithful discharge of their trust, shall proceed to receive, sort, and count the votes for the governor, and declare the person who has the major part of the votes, to be governor for the year ensuing. The lieutenant governor and treasurer shall be chosen in the manner above directed."

This section does not, *in terms*, require that the voting for state officers shall be in the same *place*, or *meeting*, at which the representative is chosen, but if that is its fair spirit and meaning, it is equally imperative. The fundamental law of the state must not receive any strained or forced construction, or be made to yield by reason of any peculiar exigency in public or private matters, but must be kept and preserved at all times, the same uniform test and guide, for the citizen, as well as every department of the government established under it. Something may be learned of the understanding of the framers of the constitution, and of the people who adopted it, by a brief reference to the history of the adoption of the constitution, and the early legislation under it.

The first constitution of this state was formed by a convention of delegates from the several towns, which met at Windsor, on the 2d day of July, 1777. This was just at the time of the invasion from the north of the British army, under Burgoyne, which caused great

alarm and confusion among the inhabitants, especially in the western part of the state, where many abandoned their homes. The disturbed condition caused by this, and also by the conflicting claims of jurisdiction by New York and New Hampshire, was such, that this constitution was never submitted to, or ratified by, any vote of the people.

But notwithstanding, a state government was organized under it, and the first legislature met at Windsor, on the 12th day of March, 1778. The provisions of the original constitution, for the election of representatives to the legislature, and of state officers, were in very nearly the same language as the sections of the present constitution already quoted. The second session of the legislature was holden at Bennington in February, 1779. At that session an act was passed "for regulating the election of governor, deputy governor, council, and treasurer."

That act, so far as need be quoted, was in the following words:— "The constables in the several towns in this state, without further order, shall, by themselves, or some person deputed by them, warn all the freemen in their respective towns to meet together in some suitable place, by them appointed, in said town, on the first Tuesday of September annually, at nine of the clock in the morning, at which time shall be read the freeman's oath, and the last paragraph of this act against disorderly voting; who shall then proceed, first to choose representatives to attend the general assembly for the year ensuing, on the second Thursday of the succeeding October. Then the freemen shall proceed to bring in to the constable present, the name of him whom they would choose to be governor for the year ensuing, fairly written on a piece of paper, which the said constable shall receive, and, in the presence of the freemen, seal up the same in a piece of paper, and write on the outside of the paper so sealed, the name of the town, and then add these words, viz: *Votes for the Governor;* in like manner for the deputy governor, and treasurer." Some question having arisen as to the binding force of the constitution, the legislature, at their June session, 1782, held at Windsor, passed an act declaring it valid and binding, as a part of the laws of this state. The first council of censors elected under the constitution in 1785, proposed many amendments to the constitution, to be submitted to a convention of the people for adoption, and the same

was done by the second council, elected in 1792, some of which were adopted by the conventions called to act upon them. No substantial change, however, was proposed as to the manner of electing governor, and other state officers, and the original provision was preserved substantially unchanged. The convention called by the second council, and which met in 1793, made a recast of the constitution, embracing all the amendments adopted by the two conventions, making it, in form at least, an adoption of the entire instrument, by that convention, and it was promulgated, and has remained in that form, with subsequently adopted amendments added thereto.

During all this time the act of 1779, above quoted, remained in force. But a small part of the state was settled at this period, and that sparsely, and all public affairs were conducted by a few leading men among the settlers, so that the framing of the constitution, and the early legislation under it, were substantially the work of the same hands.

The act of 1779 shows clearly how this provision of the constitution was then understood; that the votes for governor, lieutenant governor, and treasurer, were to be given in the same meeting at which representatives were elected, that the votes were to be brought in, and delivered to the constable of the town *present*, and to be sealed up in the presence of the freemen.

The uniform and uninterrupted requirement of the law, and the usage and practice under it, from the organization of the state, to the present time has been, that the voting for governor, and other state officers, elected by the people, has been in "freemen's meeting," the same in which the representatives have been chosen.

In the opinion of the supreme court of Connecticut, given upon the constitutionality of a similar law, proposed in that state, it is said:—"The convention found the 'freemen's meeting' a distinct and peculiar feature in the political system of the state, as old as its history. It originated in 1639, in the compact or constitution formed by the towns of Hartford, Windsor and Weathersfield, in a provision for the warning of a 'freeman's meeting,' to elect deputies from each town to the general court. From that year, and after the merger of the New Haven colony, under the charter of Charles, there has never been an election *by the people*, of representatives or state officers, in any other manner or place. The convention adopted this feature, as

they did in the main the other institutions of the state, changing its name to 'electors' meeting.'"

This language is, in a good measure, applicable to this state also. A large proportion of the leading men in the early settlement of this state were from the state of Connecticut, and the public institutions, and forms of government, were mainly fashioned upon those of that state. So far was this carried, that in our early legislation it was common for the legislature to enact that certain offences should be punished "as provided in the Connecticut law book." In the early settlements in the state, the first form of governmental authority was the *town meeting*, and almost the first form of an official was the *town constable*. Until the formation of a constitution and a state government under it, all governmental power was in the town, or by delegates from the towns, and "committees of safety," chosen by such delegates.

In our opinion, there is no reasonable ground of doubt, that when the constitution requires the votes for governor to be "brought in to the constable," it means the constable of the town, the presiding officer in the freeman's meeting. It has been suggested that the office of constable is one not created, or required by the constitution; that it would be perfectly competent for the legislature to abolish the office, and provide that some other officer should preside in freemen's meetings, as they have already, in the case of the absence or inability of the constable.

But, granting all this to be true, it proves nothing, provided the constitution, in the use of the word constable, meant the constable of the town, whose official authority was, of course, by law limited to the town, and who could not legally act officially, either in receiving votes, or otherwise, beyond its limits.

For, although the legislature might have power to provide some other officer to preside in the meeting, it would still remain equally clear that the constitution intended the voting to be in the town, or *freemen's* meeting.

The whole tenor and spirit of the provisions of the constitution, as it seems to us, point in this direction. The votes for governor are required to be given on the same day representatives are chosen, the meetings for the choice of which must be within the several towns. If meetings could be held at other places, without any town

in the state, why the requirement that it should be on the same day? The language used—"shall bring in their votes"—is significant also. Following the previous direction for choosing representatives, it evidently means the same meeting, on the same occasion.

. The further provision that the constable shall seal up the votes, and deliver them to the representative chosen to the general assembly, is in unison with the same idea; that the choice of representative, the voting for state officers, the sealing up and delivery of the votes by the constable to the representative, are all to be simultaneous and concurrent acts, performed upon one and the same occasion.

We have heard it suggested, that though this may be the true meaning of the language of the constitution, still that there is no prohibition against voting elsewhere, and that therefore a law authorizing votes at other places, and without the state, is not a violation of the constitution.

Upon this point we cannot better express our own ideas, than to quote the language of the supreme court of Iowa, in a recent case upon this same general subject. "In either event, the constitution is to be taken as a clear and full mandate, and the legislature cannot change, extend, or control, its meaning. Thus, if the constitution declares that a thing shall be done in a particular manner or way, it is implied necessarily that it shall not be done in any other. To illustrate—If it declares that the votes of the electors shall be cast at a particular place, it is not necessary to prohibit by express words their being cast at any other. But if there is no such express declaration, and none fairly to be implied, it is within the power of the legislature to fix the place."

The legislatures of several states have passed, or proposed to pass, laws similar to the one under consideration, several of which have received a judicial examination, and it is proper that they be here referred to, although none of them are precisely in point, owing to the differences in state constitutions, yet the principles upon which the decisions have proceeded, may aid in solving the question under our own. The first case arose in Pennsylvania, and, being a case of contested election, came before the court in the regular course of judicial proceeding, and was fully argued by learned counsel.

The provision of the Pennsylvania constitution, upon which the validity of their law was to be decided, was in the following words:—

"In elections by the citizens, every white freeman, of the age of twenty-one years, having resided in the state one year, *and in the election district where he offers to vote ten days immediately preceding such election*, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector."

The case was examined and discussed with great fulness and ability by the court, and they held that *election districts*, within the meaning of their constitution, denoted territorial sub-divisions of the state; that the right of voting, by the constitution, must be exercised within the district; and that a law authorizing citizens of the state in the military service of the United States, to give their votes without the state, was contrary to the constitution, and void. The opinion of the court is very lengthy, and quite exhaustive of the whole subject, but we have no space to allow quoting from it. The case may be found reported in the American Law Register, January No., 1863, *Chase* v. *Miller*. The question was next presented in Connecticut. A law of this character was proposed in their legislature, and, in pursuance of a law and usage in that state, the judges of the supreme court were convened by the governor, to advise as to the constitutional power of the legislature to enact such a law. Upon consideration, the judges certified their unanimous opinion to be, that such a law, in respect to the election of governor, and various other state officers, was not warranted by their constitution.

The constitution of that state provides that "The meetings of the electors for the election of the several state officers, by law annually to be elected, and members of the general assembly of this state, shall be holden on the first Monday of April in each year;" and also that "At the meetings of the electors, held in the several towns in this state in April annually, after the election of representatives, the electors present shall be called upon to bring in their written ballots for senators, &c." Very similar language is used in the constitution in reference to the election of governor, and various other state officers.

In the opinion of the judges, this language of the constitution re-

quired that the votes cast for senators, governor, &c., should be in electors' *meetings*, held in the several towns in the state.

The whole subject was again ably and thoroughly discussed in the opinion of the court but we can only refer to the report, 30 Conn. 591. At the June session, 1863, of the New Hampshire legislature, a law was proposed, authorizing every qualified voter of that state, in the military or naval service of the United States, to appoint an attorney to deposit his vote for him at his place of residence, at any election for state, county, or town officers in that state.

By a resolution of the legislature, the justices of the supreme judicial court of that state, were requested to give their opinion as to the constitutionality of the proposed law. The opinion was given against the constitutionality of the law, the court holding that by their constitution the right of voting must be exercised by the voter in person, and not be delegated to, or performed by an agent or attorney; and that by their constitution the right must be exercised by the voter within the state, at the times and places pointed out by the constitution. It is needless to quote from the New Hampshire constitution, as the very form of the proposed law shows that it was not claimed that the right of voting could be exercised without the state. The opinion of the judges may be found in Am. Law Reg., October, 1863, p. 740. The remaining and latest decision on the subject that we have met with, is from Iowa. Several cases came before the court, all involving the question of the legality of votes cast without the state, by citizens and voters of the state in the military service of the United States, for certain state and county officers. The legislature of the state had passed a law authorizing such votes cast without the state, to be received and counted in such elections, and the question was as to the validity of the law. The constitution of Iowa contains this clause, "Every white male citizen of the United States, of the age of twenty one years, who shall have been a resident of this state six months next preceding the election, *and of the county in which he claims his vote sixty days*, shall be entitled to vote at all elections, which are now, or may be, authorized by law."

It appears from the report of these cases in the Am. Law Reg., March, 1864, p. 276, that the question was fully argued by counsel, and received the full and careful consideration of the court. The

court decided that the law of the state in question was constitutional; that the article in the constitution above quoted, only defines the qualifications of voters, and does not prescribe the *place* where the elective franchise is to be exercised. The court, in the opinion given by WRIGHT, J., cite the cases from Pennsylvania, Connecticut and New Hampshire, with approbation, and advance no principle of constitutional law at variance with them. The argument of the court, by which the language of the section above quoted is made to apply to the general qualification of the voter, and not to the place of voting, is exceedingly subtle and ingenious, and we are not prepared to say it is not sound, but it seems to us quite difficult to make this and the Pennsylvania case stand together, though the opinion attempts it. Construed by the plain and natural rules of construction that should prevail in the interpretation of constitutions, "*where he offers to vote*," and "*in which he claims his vote*," as applied to the subject, mean the same thing. It is not at all necessary for our purpose to undertake the determination of the respective soundness of the two decisions, as neither is sufficiently like our own case to have any controlling influence. It is quite apparent, however, that the Iowa court entertained great doubt as to the soundness of their own construction, as they go on to prove, by argument and authority, that it is their duty to uphold the law, unless it is *clearly*, *palpably* and *plainly* inconsistent with the provisions of the constitution. That this becomes their duty, because the constitutionality of the law had been pronounced in favor of by the legislative and executive branches of the government, acting in their official capacities, and upon their official oaths. We are not prepared to question the reasoning upon this point, but if we could regard the question under our constitution, as really of a doubtful character, we cannot shelter ourselves behind, or rest our own judgment upon, the pre-judgment of the other co-ordinate branches of the government. From the manner in which our law was passed, it does not appear that any expression of opinion can be gathered from the action of the legislature, or the executive. The law was to be in force, or not, as the answer of the judges should be. The most that can be gathered from the passage of the act, as to the opinions of the legislative and executive departments, is, that they would favor such a law, if it is constitutional; in this opinion we should doubtless fully concur.

We do not regard these decisions in the several states as having any very direct bearing upon the question before us, except the decision in Connecticut. That one is quite analogous, as the provisions of the Connecticut constitution are so nearly like our own, and are not more restrictive of the power of the legislature than those of our own state.

Looking to the language of our constitution, the state of things existing at the time of its formation, the early legislation under it, the uniform legislation and usage of the state since, and the various discussions and decisions in other states, we are clearly satisfied that by the fair construction of our constitution, the right of voting for governor and other state officers, can only be exercised within the state, in the "freemen's meetings," to be held within the towns on the first Tuesday of September in each year.

We appreciate fully the noble patriotism of our citizens who have voluntarily gone forth to peril their lives in the defence of the constitution and government, and would be the last to deprive them of the exercise of any civil right, but, as was well said by the Pennsylvania court, "While such men fight for the constitution, they do not expect judges to sap and mine it by judicial construction."

The power of the legislature to authorize votes to be cast without the state, for representatives in congress and electors of president and vice-president, depends upon entirely different considerations.

It cannot be claimed to be contrary to any provisions of the constitution of this state, for the constitution is entirely silent upon the subject, and the constitution of this state, with substantially the same provisions as to voting as now contained, was established several years prior to the admission of the state into the Federal Union. The law to this extent must therefore be regarded as valid, unless it contravenes some express, or implied, provision of the constitution of the United States, or some law of congress on the subject, coming within the control given them by the constitution. Sec. 2 of Art. 1 of the United States constitution provides—"The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Sec. 4, of Art. 1, is as follows:—"The times, places, and manner

of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof, but the congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators."

These are the only clauses of the constitution bearing upon the election of representatives in congress. It cannot be claimed that anything is established by these as to *time* or *place* of voting. The whole subject is entrusted to the state legislature, subject to the control of congress. As we have already seen, if the constitution does not prescribe the *time*, and *place*, it rests wholly in the discretion of the legislature to establish them by law.

We are not aware of any act of congress upon the subject of electing members of congress, except to require that they should be chosen by districts.

Sec. 1, of Art. 2, provides for the choice of electors, and is as follows:—

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress, but no senator, or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. The congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States." Under this provision, the appointment of electors has been variously provided for by the state legislatures. In some states the legislatures have directly chosen the electors themselves. This mode of election was followed in this state, as we now recollect, down to 1824. In other states they have been chosen by general ticket throughout the whole state, and in others the legislatures have divided the state into election districts, for the choice of electors. All these various modes of election have been regarded as fairly within the power of the legislatures. The only power given congress, is that of fixing the time of the election. This power they have exercised.

In 1792, congress passed an act, requiring the choice of electors in each state to be made within thirty-four days preceding the first Wednesday in December, and the electors themselves to meet, and cast their votes on that day.

In 1845 an act was passed by congress, requiring the choice of electors to be made in all the states on the Tuesday next following the first Monday in November of the year designated for a presidential election, with power to the state legislatures to provide for filling any vacancy that may occur. Under this, our legislature have provided that, in case of a vacancy at the meeting of the electors, the residue of the electors may fill it. Upon the principles already alluded to, there would seem to be no ground to question the power of the legislature to authorize voting for electors, as they have done by this bill. Voting for representatives to congress, and for electors, has never been understood by our legislature as affected by the provisions of our constitution. It has frequently happened that congressional elections, and presidential elections have occurred while our legislature has been in session, and it has been common for the legislature to provide by special act, to allow members of the legislature, and others in attendance on the legislature, voters in such district, to vote at Montpelier, though not within their congressional district, and also to vote for electors.* The propriety of such action we have never heard questioned.

In the various cases that have arisen in other states, we do not find that the question of the validity of such laws, as applied to voting for electors, and representatives in congress, has been discussed at all; whether because it has been regarded, as we regard it, free of doubt under the constitution of the United States, or that there has yet been no occasion for such discussion, we do not know.

It is proper that we should notice a clerical error in the third section of the act submitted to us. The day of the election of electors is designated as the first Tuesday of November. The first Tuesday after the first Monday in November is the day fixed by the act of congress, which will be the second Tuesday of next November. We notice this that it may be corrected in time.

The examination of the subject has been attended with great embarrassment, as we have not had the advantage of argument by counsel, to present either side of the question; and the official engagements of the several members of the court have been such, that it has not been possible for them to be all present together at any

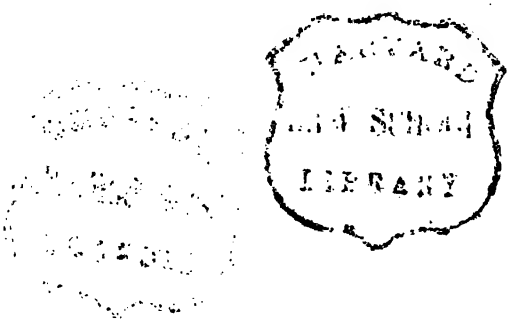
*e. g., Acts of 1850, No. 73.

time to discuss the subject, and compare views and reasons. We hope, however, to have been able to make our views of the question understood.

We therefore certify to your Excellency, that, in the opinion of the Judges of the Supreme Court, so much of the act in question as authorizes votes to be given for governor, lieutenant governor, and treasurer, without the state, or at any place, except in a *freemen's meeting*, holden in some town within the state, is unconstitutional; and that so much of said act as authorizes such voting for members of congress, and electors, is not contrary to any provision of the constitution of this state, or of the United States.

LUKE P. POLAND,
ASA OWEN ALDIS,
JOHN PIERPOINT,
JAMES BARRETT,
LOYAL C. KELLOGG,
ASAHEL PECK,
} *Judges of the Supreme Court of Vermont.*

ST. JOHNSBURY, April 1st, 1864.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INDEX.

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ABATEMENT. *See* PAUPER, 4.

ACCEPTANCE. *See* BOOK ACCOUNT, 3; CONTRACT, 3.

ACCOUNT.

1. Where the parties to an action of account had, previous to the suit, adjusted any portion of their account, the defendant is not bound to plead specially as to that portion, that he has accounted. The whole account may go before the auditor, and the defendant has the benefit of the evidence so far as it shows he has accounted. *Morgan* v. *Adams*, 233.

2. If there was a single item left unadjusted, the defendant cannot plead in bar of a judgment to account, that he does not owe the plaintiff. *Ib.*

3. A general settlement of a partnership account is a sufficient consideration for a withdrawal of a disputed item by one of the parties, to render the final adjustment binding. *Ib.*

4. The transaction in this case at the meeting of the parties and arbitrators, was a settlement and payment by the parties, and not an award of arbitrators. *Ib.*

5. The action of account may be maintained at common law by the representative of a deceased partner, against the surviving member of a co-partnership; nor is it interdicted by our statutes on the subject, they having been passed not for the purpose of limiting the action to the cases enumerated, but to extend it to certain cases where it did not lie at common law. *Newell, Adm'r*, v. *Humphrey*, 265.

6. There can be no revision of the merits of the judgment to account on the hearing before the auditor, or on the hearing upon his report. *Porter* v. *Wheeler*, 281.

See PARTNERSHIP, 6, 7.

ACTION ON THE CASE.

1. If a man violates the rights of another by a wrongful act, the latter has the right by law in a peaceable way to prevent it, and save himself from harm if he can, and to use the necessary means to that end, even if such means produce some incidental hurt or damage to the former. *Beard* v. *Murphy*, 99.

See SHERIFF'S SALE, 1, 2.

ADMINISTRATORS. *See* EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION.

1. The plaintiff was in possession of the land in controversy, claiming to have bid it off at a tax sale. W. subsequently entered into possession, claiming to have paid the tax and to have a receipt therefor. They then agreed that W. should remain in possession the rest of the season, and if he did not produce said receipt he should quit, which he did in the fall without producing the receipt. *Held*, that W.'s possession was not in subjection to the plaintiff's title, therefore it broke the continuity of the plaintiff's possession. *Austin* v. *Bailey et al.*, 219.

2. A legal estate obtained by fifteen years' adverse possession cannot pass by mere verbal surrender. *Ib.*

3. Where the rights of both parties stand upon mere possession not yet ripened into a perfect title, he who has the prior possession has the best right; but if he abandon and surrender it to the adverse party he cannot afterwards set it up. *Ib.*

4. Where a right has been acquired by adverse enjoyment, it will not be defeated by asking for and obtaining a license for a continued use from the owner of the servient tenement; but this would be evidence tending to prove that the previous possession was not adverse, or under a claim of right. *Perrin* v. *Garfield et al.*, 304.

5. In 1833 F. erected a mill about a mile from the defendants' pond, and entered into the use and occupancy of a dam and flume, previously built by C. at the outlet of the pond to supply his mill which formerly stood near the site of F.'s mill, and continued so to use it for eighteen years. His mill was almost wholly dependent on the water obtained by means of the dam and flume for its supply. *Held*, that in the absence of proof that F., or C. or his successors, ever procured any license to erect or keep up said dam, or ever acknowledged any title in any one, the county court were warranted in finding F.'s use adverse. *Ib.*

6. *Held*, also, that the county court were warranted, under the circumstances of this case, in finding that the owners of the servient tenement had notice of such use. *Ib.*

7. The presumption of notice was not rebutted by the fact that the lands about the pond were wild and uncultivated until 1850. *Ib.*

8. *Held*, that the easement would pass with the mill in a sale of the latter, notwithstanding its character and distance from the mill. *Ib.*

9. Where the defendant claimed by adverse possession to a line not marked so as to be discernible, the fact that he had for over twenty years enclosed the land in dispute with his other lands by a fence which extended and embraced other land of

the plaintiff beyond the line to which he claimed, would not give the defendant constructive possession to such line. *Wood et al.* v. *Willard et al.*, 377.

See CHANCERY, 2.

AGENCY.

1. Where an agent becomes personally responsible for goods purchased for his principal, the latter cannot claim that their relations as principal and agent are changed thereby. *Dow* v. *Worthen*, 108.

2. C. was the plaintiffs' agent for selling the goods in question, a chest of tea and barrel of molasses, and goods of this character, and, at time of the sale to the defendant, was insolvent and was endeavoring to effect a compromise with his creditors; he owed the defendant twenty dollars and agreed to pay that debt out of the price of the goods sold him, in consideration that the defendant would assist him in compromising another of his debts; he at the same time told the defendant he was not carrying on business in his own name. *Held*, that these facts were sufficient to put the defendant on inquiry as to C.'s true relation to the goods and of his lack of authority thus to dispose of them, and being so affected with notice he cannot set off his claim against C. in an action for the goods by C.'s principal. *Squires & Sherry* v. *Barber*, 558.

See CORPORATIONS, 4, 5: HUSBAND AND WIFE, 10–12; INTOXICATING LIQUOR, 5; LIMITATIONS, STATUTE OF, 7; TRUSTEE PROCESS, 15; UNION STORE ASSOCIATION, 2, 3.

AMENDMENT. *See* PAUPER, 4.

APPEAL.

1. If an appeal from the probate court to the county court is entered without giving to the appellee the requisite notice, the practice is not to dismiss the appeal, but to continue the case and give the notice,—the same as under the Probate Act of 1821. *Meech* v. *Est. of Meech*, 414.

See CHANCERY, 3; DOWER, 4; PLEADING, 1.

ARBITRAMENT AND AWARD.

1. In an arbitration of "all matters of difference between the parties," including a suit previously brought, if the arbitrators find that the balance due, both at the time of the suit and of the arbitration, was against the plaintiff, they need not specify what the balance was when the suit was brought as affecting the question of costs. *Woods* v. *Page*, 252.

2. If the parties to an arbitration, upon the trial before the arbitrators, submit by *mutual consent* matters not included in the written submission, and thereupon the arbitrators try the matters so verbally submitted and make their award, neither party can object that the award exceeded the submission. *Ib.*

3. The defendant executed to the plaintiff a mortgage deed of his farm, with a condition securing to the plaintiff his support and maintenance during his natural life. The condition of defeasance contained a provision as follows, viz: "or if I shall have an opportunity to sell said farm and shall wish to do so, I shall have the

right to do so by paying or securing to the said Weeks (plaintiff) such sum and in such manner as the judge of probate for the district of Caledonia, for the time being, shall consider will be just and right for the remainder of the life of the said Weeks from such date." *Held*, that there must be a concurrence of both conditions, viz: an opportunity and desire to sell, before the judge of probate would be authorized to act in the premises; therefore in the absence of all proof of the existence of these conditions, or of the former only, an award of the judge substituting a different mode of performing the condition of defeasance, would be inoperative. *Weeks* v. *Boynton*, 297.

4. The award provided that the defendant should execute and deliver to the plaintiff a bond in a sum specified, with one or more sureties, to the acceptance and approval of the cashier of the Bank of Caledonia, conditioned for the faithful performance of the award, &c. *Held*, that this provision conferred upon the cashier a trust or discretion, which by the condition of defeasance, was vested in the judge alone. *Ib.*

5. The plaintiff's counsel remarked in his presence, when the award was made, that "they were satisfied, and had come out better than they had expected." *Held*, that the plaintiff's silence, when this remark was made, was not equivalent to such an acceptance of the award as would change his rights under the mortgage. *Ib.*

See ACCOUNT, 4; STAMP, 1.

ASSIGNMENT.

1. L. being insolvent, and his property attached, in February, 1849, made an assignment of all his attachable property, except an interest in western land of uncertain character and amount, to H., in trust for the benefit of certain attaching creditors therein named. At the same time he agreed upon terms of composition and settlement with the creditors, under which he was to execute certain notes to them severally, which they were to accept in discharge of their debts, and were to discontinue their suits, and release the attachments, and L. was to secure these notes by an assignment of his property. Said assignment was made in fulfilment of this agreement, and the assignee was directed to sell and dispose of the property assigned, and pay these notes in equal proportions out of the proceeds, as far as funds might be realized from the sales. *Held*, that this was a general assignment, and under the act of 1843 void as against creditors; that its character as an assignment was not affected by the contract of composition and settlement. *Therasson* v. *Hickok*, 454.

2. There being an express resulting trust in the instrument for the assignor, without any provision to pay creditors not named therein, it was also void at common law. *Ib.*

3. Prior to the assignment a creditor of the assignor not named therein, had commenced a suit against the assignor by attachment of his real estate, and pending the suit assigned his debt to the orator, who prosecuted the suit until 1858, when a non-suit was entered for reasons not affecting the validity of the debt, and immediately afterwards a new suit was commenced in the name of said creditor against L. to recover this debt, and all the real estate described in said assignment remaining unsold was attached as the property of L. In November following L. died, and the orator discontinued his suit and presented his claim to the commissioners on L.'s estate, which was allowed. The orator then brought a bill in chancery against

the assignee and the administrators of L.'s estate, praying, in substance, among other things, that the assignment be decreed void as against the orator, and that his debt be paid out of the assigned property, with interest and costs. *Held*, that the orator cannot be regarded as having assented to the assignment, nor is his claim barred by the statute of limitations; but he is entitled to have the assignment set aside for his benefit. *Ib.*

4. *Held*, that the subject matter of the bill is clearly within the cognizance of a court of equity. *Ib.*

5. *Held*, that the creditors provided for in the assignment are not necessary parties to the bill. *Ib.*

6. *Held*, that the assignment is not void as to other persons who became creditors of L. subsequently to the making of it, nor is it to be set aside as a nullity between the parties to it. *Ib.*

7. The assignee is not answerable for payments made under the assignment before the filing of the orator's bill, nor should costs be charged against him; and he should be allowed his necessary expenses for converting into money that part of the assigned property still in his hands. *Ib.*

See TRUSTEE PROCESS, 6.

ASSOCIATIONS. *See* FREE MASONS; UNION STORE ASSOCIATION.

ASSUMPSIT. *See* FRAUDS, STATUTE OF, 2, 3.

ATTACHING CREDITORS. *See* ATTACHMENT.

ATTACHMENT.

1. An attachment upon land creates a specific lien thereon, and vests in the attaching creditor a right in equity to redeem the land, even before judgment and levy, from a prior incumbrance, in order to make his own claim beneficial or available to himself. *Chandler* v. *Dyer*, 345.

2. He is entitled to the same right of redemption as a mortgagee has; and if not joined as a party in a suit of foreclosure upon the same land, his right to redeem is not affected by the decree. *Ib.*

3. His payment of the prior mortgage incumbrance is not regarded as a voluntary payment, but the exercise of an equitable right,—and, as against the mortgagor and all holding under him, and subsequent to his, the creditor's, attachment, the effect of the redemption is not to extinguish the mortgage so redeemed, but to keep it alive as a subsisting lien upon the land, whether the creditor pursue his attachment lien or not. *Ib.*

4. The fact that the first and third incumbrance, the attachment being the second, were held by the same person, would not give him any greater rights than the holder of the third would have if he had not held the first. *Ib.*

See CHATTEL MORTGAGE; RECEIPTOR, 1.

ATTORNEY.

1. A retainer of an attorney is a sufficient consideration to support a promise to pay such attorney a debt due him from another, if such promise be in writing. *Fullam* v. *Adams*, 391.

2. A retainer to defend a suit does not extend to the employment of the attorney to defend a second suit brought upon the recognizance entered in the first suit. *Smith* v. *Dougherty*, 530.

3. The attorney was the party to recognize in the first suit, and, being sued upon the recognizance with his principal the defendant in this suit, entered to defend and made a tender without the defendant's express directions but with his knowledge. This tender constituted the only defence. *Held*, that knowledge of the attorney's appearance and defence by the defendant did not imply an assent to the employment of the attorney and make the defendant liable therefor. *Ib.*

See FRAUDS, STATUTE OF, 4.

BANKS.

1. The Danby Bank was in business several years without contributing to the bank fund, the directors giving bonds instead for the security of the bills and deposits. After 1856 the directors did not give bonds but paid into the fund. *Held*, that the liability of the fund attached at once upon the failure of the directors to give bonds. *Danby Bank* v. *State Treasurer*, 541.

2. *Held*, also, that the state treasurer was properly made a party to the application for the fund. *Ib.*

BOND. *See* INTEREST, 2; MORTGAGE, 1.

BOOK ACCOUNT.

1. Damages for trespass cannot be adjusted in the action of book account unless the parties mutually agree to treat the *tort* as matter of contract. *Stow* v. *Black*, 25.

2. In this case the county court correctly found from the auditor's report that the parties had made no such agreement. *Ib.*

3. The plaintiff delivered to the defendants a quantity of lumber according to the contract between them, a portion of which the defendants used, but being dissatisfied with the plaintiff's measurement of the remainder, which was according to the custom of the place, refused to accept it. *Held*, that the contract being entire, the actual acceptance and use of a part may well be treated as an acceptance of the whole. *Carpenter* v. *Brainerd et al.*, 145.

4. *Held*, that there may be a recovery for the same in a book action. *Ib.*

5. When one of the parties to a book action does not insist upon certain items of his account, and for this reason the auditor disregards them without going into their merits, no question can properly afterwards be raised by the said party in respect to them. *Weeks* v. *Boynton*, 297.

6. Under § 24, ch. 39, p. 327, General Statutes, which provides when, in case of the death or insanity of one party, the other may be a witness, it is held that a party has the same right to testify in actions of book account, and where the matter at

issue and on trial is proper matter of book account, as in other actions, and in addition, the right to testify to the hand writing of his charges and when made. *Thrall & Smith* v. *Seward, Adm'r*, 673.

7. Under the act of 1852, (§ 18, p. 344, G. S.) courts have no power to settle general and extensive partnership dealings in book actions. *Hydeville Co.* v. *Barnes*, 588.

8. Where one of the parties to an account dies and his administrator brings an action on book against the other party, the latter cannot, under the provisions of § 24, ch. 36, p. 327, G. S., be a competent witness to testify to a settlement with the intestate of said account. The restriction under said section applies to the party living, whether he be plaintiff or defendant, and though the action was pending when said section was enacted. *Johnson, Adm'r*, v. *Dexter*, 641.

9. The act of 1864, No. 31, though in form giving construction to said section, can be regarded as having no other effect than to change the law from the passage of the act itself. *Ib.*

See TRUSTEE PROCESS, 13.

BORROWED PROPERTY. *See* TROVER, 1.

BOUNTY MONEY. *See* TRUSTEE PROCESS, 15.

BY-LAWS. *See* FREE MASONS; UNION STORE ASSOCIATION.

CARRIER. *See* PLEADING, 4.

CHANCERY.

1. Where the answer is not responsive to the bill, or sets up affirmative allegations in opposition to, or in avoidance of, the plaintiff's demand, and is replied to, the answer is of no avail in respect to such allegations, and the defendant is as much bound to establish the allegations so made, by independent testimony, as the plaintiff is to sustain his bill. *Wells* v. *Houston*, 245.

2. The oratrix claimed title by adverse possession. The defendant, to avoid this title, set up the right of the town to the proprietary right of the first settled minister, and that he entered upon the premises under direction of the town as one of the selectmen. *Held*, that this was not responsive to the bill, and not being sustained by proof, the defendant failed to connect himself with the title of the town, therefore he could not stand upon that title. *Ib.*

3. Rule of practice upon appeal from chancery. *Smalley* v. *Corliss*, 486.

See ASSIGNMENT, 4; HUSBAND AND WIFE, 1, 7.

CHATTEL MORTGAGE.

1. A debtor of the plaintiff, while the plaintiff was living in New Hampshire, where the debtor then lived, gave the plaintiff a chattel-mortgage of the property in suit, which was valid by the laws of New Hampshire without change of possession. The debtor then brought the property into Vermont with the consent of

the plaintiff, and used it for some months, having the exclusive possession of the same, when his creditors in Vermont caused it to be attached, and the plaintiff brought this action of trespass against the attaching officer. *Held*, that the plaintiff's lien by virtue of his chattel-mortgage being good by the laws of New Hampshire, was equally valid in Vermont, and the plaintiff was entitled to recover. *Cobb* v. *Buswell*, 337.

CHARACTER. *See* EVIDENCE, 2.

CLAIMANT. *See* TRUSTEE PROCESS, 1, 14.

CONDITIONAL SALE. *See* MORTGAGE, 2.

CONFESSION OF JUDGMENT. *See* JUDGMENT, 3.

CONFESSIONS.

1. The respondent, under the influence of inducements held out by the officer and an assistant, who made the arrest, made confessions to the latter. Five hours later, on being told by the state's attorney that he must not expect any favor in consequence of a confession; that he was under no obligation to make one unless he chose to, he made a second confession. *Held*, that the second confession was admissible as evidence, and it will not be presumed to have been made under the influence of the previous inducements. *State* v. *Carr et al.*, 191.

CONFLICT OF LAWS. *See* CHATTEL MORTGAGE.

CONSIDERATION. *See* ATTORNEY, 1; PROMISSORY NOTES, 1, 2; USURY, 6.

CONSTITUTIONAL LAW. *See* LAWS.

CONSTRUCTIVE POSSESSION. *See* ADVERSE POSSESSION, 9.

CONTINGENT CLAIM.

1. If an administrator neglect while he lives to pay to the creditors of his testator's estate the amount found in his hands on settlement of his administration account, and ordered by the probate court to be paid them, the claim for such amount against the administrator's estate is absolute and not contingent, and should therefore be prosecuted as such before the commissioners. *Adm'r of Sargent* v. *Adm'r of Kimball*, 320.

2. A contingent claim is one where the liability depends on some future event, which may or may not happen, and which therefore makes it wholly uncertain whether there ever will be a liability. *Ib.*

CONTRACT.

1. By the contract the plaintiff was to furnish a monument of "good white marble." He did furnish a monument of which the material was "good white marble,"

but it had a discoloration on it, gotten there by accident, but temporary in character, and by lapse of time and by exposure to the open air and frost would disappear. *Held*, that the contract was not complied with, and the plaintiff was justified in refusing to accept the monument. *Viall* v. *Hubbard*, 114.

2. The substitution of "Octavia J." for "Octavia Jane," was also a substantial defect, although made by the marble worker in good faith, believing the inscription as he made it would look better and be more satisfactory. *Ib.*

3. The facts reported do not constitute an acceptance of the monument. *Ib.*

4. The plaintiff took one hundred sheep of the defendant in May to pasture through the season, the defendant at the time of the bargain saying that he wanted to fatten the sheep for the market in the fall, and the plaintiff that he had sufficient pasturage to keep one hundred and fifty sheep, but would take none but these, and would keep them as such sheep ought to be kept. In September the defendant ascertaining that the pasture was wholly insufficient, and that the sheep were growing poor, took them away. *Held*, that the plaintiff having failed to perform the contract on his part could not recover on the contract for the keeping of the sheep, but the defendant had the right to terminate the contract and take the sheep away. *Corliss et al.* v. *Putnam*, 119.

5. *Held*, also, that the finding of the auditor that the sheep were not worth as much, in consequence of the plaintiff's failure to perform the contract as they would have been if he had performed it, by more than the contract price of keeping, was conclusive that the plaintiff could not recover upon any principle. *Ib.*

6. The plaintiff had possession of certain goods and chattels belonging to C. as a mere cover to defraud the creditors of C. by keeping said property beyond their reach by attachment; and for further protection conveyed the same to the defendant and took his note therefor under an agreement between them and C. that the defendant should dispose of this property and pay the avails thereof over to C. and that this should operate as a payment and discharge of the note. *Held*, that a performance of the contract by the defendant would constitute a defence to an action on the note by the plaintiff. *Carpenter* v. *Mc Clure*, 127.

7. Such a contract need not be in writing to make it valid, consequently it need not be so alleged in a plea. *Ib.*

8. A purchaser cannot rescind a contract induced by misrepresentation and fraud, after he has disposed of the purchased property, by offering to restore to the vendor what he, the purchaser, has received for it, although he disposed of it before discovering the fraud. *Mc Crillis* v. *Carlton*, 139.

9. His remedy will be an action for damages, or a reduction from the contract price, to the same extent, if that is yet unpaid. *Ib.*

10. Upon consideration that the plaintiff, a dentist, would keep himself supplied with mineral teeth by purchases of the defendant, the latter agreed not to sell such teeth to any other person in the place where the plaintiff resided. *Held*, that the contract being only in partial restraint of trade, was not illegal. *Clark, Adm'r* v. *Crosby*, 188.

11. The defendant contracted with the plaintiffs for a quantity of potatoes to be delivered during the winter as called for by the defendant. Before they were all purchased by the plaintiffs the defendant notified them by letter not to purchase any more potatoes until they should hear from him. This order was never countermanded. *Held*, that this letter was not a rescinding of the contract, but a refusal to receive any more potatoes upon it than the plaintiffs had on hand, or had already purchased. *Danforth et al.* v. *Walker*, 239.

12. *Quere*, whether the contract was binding within the statute of frauds. If binding, the rule of damages for the breach on the part of the defendant as to the requisite quantity to be purchased by the plaintiffs when they received said letter would be the difference between the price the defendant had stipulated to pay, and what it would have cost the plaintiffs to procure and deliver the potatoes according to the contract. *Ib.*

13. In executory contracts, a party has the power to stop the performance on the other side, by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part, at that point or stage in the execution of the contract. *Ib.*

14. The plaintiffs purchased of one Reynolds a canal boat, and took a bill of sale thereof, on which was executed by Reynolds, as part of the same transaction, a stipulation as follows: "I further agree that there is no incumbrance on said boat except what is held by P. E. Haven, and about $25. to William Cain on her sails, and I agree to pay said Cain and clear said sails from said Cain's incumbrance as soon as practicable." At the same time, and as one of the inducements to the plaintiffs to make the purchase, Reynolds procured the defendant to execute on the back of said instrument the following guaranty: "I guarantee that said Reynolds shall clear said canal boat from said William Cain's claim on said sails as he has within agreed." Cain's claim amounted to about $70. instead of $25. at the date of the defendant's guaranty, and existed under a bill of sale given by Reynolds to Cain to secure the price of the sails prior to the plaintiffs' purchase, and embraced the boat as well as the sails. All parties supposed at the time of the contract that Cain's claim was but $25. *Held*, that this agreement of Reynolds was an agreement not merely to pay a twenty-five dollar claim, but to pay Cain's claim, whatever it might be; the words "about $25." are words of description merely, not words of limitation. *Held*, also, that upon breach of this agreement the defendant became liable on his guaranty to the full extent of Cain's incumbrance. *Brown et al.* v. *Haven*, 439

15. Cain replevied the boat in the hands of one of the plaintiffs after their said purchase, and recovered judgment for the amount of his claim on the sails, and the defendant and Reynolds had notice of the suit and the former conducted the defence. *Held*, that the defendant is bound by the result; and having advised the plaintiffs that it was their duty to defend the suit, he is liable for the costs and expenses thereof, the amount of Cain's lien on the sails being less than the value of the sails. *Ib.*

16. One of the plaintiffs, previous to the bringing of this suit, had sold his interest in the boat, including his interest in the contract of purchase, to one of the other plaintiffs, and the other plaintiffs had made the whole payment of Cain's judgment. *Held*, that this did not make him, who had sold, an improper party to this suit. *Ib.*

See ATTORNEY, 1, 3; BOOK ACCOUNT, 3, 4; FRAUDS, STATUTE OF, 1–5; INTEREST, 1; LAWS; PAUPER, 6, 7; PLEADING, 3; USURY, 1, 5.

CORPORATIONS.

1. If a defendant corporation in a book account action would deny its alleged corporate existence the question should be raised by plea before judgment to account is rendered. *Hunneman et al.* v. *Fire District*, 40.

2. It appeared from the records of the defendant fire district, that at a certain meeting of the district, after choosing a moderator, it was voted to adjourn to an-

other place in the district, where the district proceeded to transact other business. The defendant offered to prove by parol that at said meeting, the district met and voted to adjourn "without day" before transacting any other business, and thereupon the members of the meeting dispersed, and subsequently, on the same evening, and late, after many voters had retired, a few voters of the district got together and did the business recorded, and that the clerk neglected to record the first vote to adjourn. *Held*, that this evidence was properly rejected by the auditor. *Ib.*

3. One article in a warning of a meeting of the defendant fire district read as follows: "To see if the district will vote to purchase a fire engine, hooks and ladders and buckets, or any portion thereof, for protection against fire, and to raise money to defray the expense of the same, or for any other purpose." At the meeting it was voted, among other things, "to choose an agent to purchase whatever of fire apparatus the district may vote to buy;" "that $500. be appropriated to defray the expenses and preparation of suitable fire apparatus for the use of this fire district;" and it was further voted, "that the agent be instructed to expend a sum not to exceed $1,000. which shall include fire apparatus and reservoirs, and all things necessary for the protection of the district from fire." The plaintiffs had a copy of the proceedings of this meeting. *Held*, that the article in the warning was sufficiently definite and certain to support the votes. *Ib.*

4. *Held*, also, that the district had the right to make contracts by an agent for the purposes contemplated in said votes. *Ib.*

5. *Held*, further, that the agent appointed, in purchasing a fire engine and apparatus with it to the value of $750. did not exceed the authority conferred upon him, and his acts are binding upon the district. PECK, J., dissenting. *Ib.*

6. The plaintiff was appointed treasurer of the defendant corporation by the directors thereof pursuant to a provision of the by-laws, all the directors but one being present at the meeting, and nothing appeared but that the absentee was notified of the meeting. The plaintiff entered upon and performed his duties as treasurer for two and one-half years, no question ever having been raised by the absent director, or any stockholder of the company, but that he had been legally appointed. *Held*, that the company cannot refuse payment for his services on the ground that he did not legally hold the office. *Waite* v. *Mining Co.*, 608.

7. It is not necessary that there should be any formal meeting of the directors in order to enable them to do any act which was properly within their power to do. *Ib.*

8. In business corporations the power to fix the salary of treasurer, is held to be incident to the general power and duty of the office of directors, if not prohibited or otherwise restricted in the charter. *Ib.*

9. It was agreed between the directors and the plaintiff, that if he would accept the office of treasurer, provide and advance funds for the company to carry on their business, and do the business of the treasurer, he should be paid therefor three hundred dollars per year, and one per cent a month for money advanced. *Held*, that the contract for interest was usurious. *Ib.*

COSTS.

1. The statute which provides that each party shall recover costs upon the issues or claims on which he shall prevail, (G. S. p. 291, § 17,) is held to apply only in cases where the issues and claims are several and distinct, and has no reference to the constituent parts of a single general issue or claim; to those issues and claims

made by the pleadings, and not to those arising on the testimony on trial. *Brainerd* v. *Casey et al.*, 479.

2. In an action of trespass *qu. cl. fr.* commenced before the county court the main question was one of boundary between the land of the plaintiff and that of the defendant. The jury found that the line claimed by the defendant was the true line, but also found that the defendant had committed trespass by cutting trees to the value of $3.50 on the plaintiff's side of this line. *Held*, that under the statute, (G. S. p. 726, § 22,) the plaintiff could recover no more costs than damages. *Ib.*

3. *It seems* that where a suit is discontinued before the return day, and no costs have been incurred by the defendant before receiving *verbal* notice of the discontinuance, the question whether he may come in and have judgment for costs is one resting wholly in the discretion of the court. *Fullam* v. *Ives*, 659.

4. This discretion was properly exercised in this case, the plaintiffs, both nominal and real, having sent the notice by the defendant's daughter, which she delivered to the defendant, who was himself an attorney. *Ib.*

See ARBITRAMENT AND AWARD, 1; ASSIGNMENT, 7; CONTRACT, 15; PROMISSORY NOTES, 8.

COUNTER CLAIM. *See* PROMISSORY NOTES, 2.

CRIMINAL LAW. *See* CONFESSIONS, 1; INTOXICATING LIQUOR, 2.

CUSTOM. *See* SCHOOL DISTRICT, 7.

DAMAGES. *See* CONTRACT, 12-15; SHERIFF'S SALE, 2; TROVER, 4.

DECLARATIONS. *See* EVIDENCE, 4, 12, 13; WILLS, 4.

DEED. *See* MORTGAGE, 1.

DEFAULT. *See* PRACTICE, 2, 5.

DEMAND. *See* LIMITATIONS, STATUTE OF, 3, 4; RECEIPTOR, 1, 2.

DEPOSITION.

1. Where the name of a magistrate by whom a deposition is to be taken is inserted in the citation, the party taking the deposition cannot have it taken by another magistrate. *Henry* v. *Huntley*, 316.

2. The words "in the course of business" appearing in the depositions in this case, held to be but an expression by the witness of his judgment of the legal result of facts which he had specifically stated, and were properly erased by the court. *Clough* v. *Patrick*, 421.

3. The defendant's counsel objected to the depositions that they were guarded and avoided details, which indicated a contrived plan to get the notes into the hands of a third party for collection. In regard to this the court told the jury that if they

found the depositions subject to this objection, it was a matter that they might take into consideration in weighing the testimony of these witnesses—that the whole question as to the truth of the depositions was for the jury. *Held*, that the court was authorized in so instructing the jury. *Ib.*

DEPUTY SHERIFF. *See* SHERIFF, 2-4.

DISCONTINUANCE. *See* COSTS, 3, 4; PRACTICE, 2.

DIVISION LINE.

1. While one is in possession of land in his own right as owner, he is to be regarded as owner, though he do not possess the legal title, and his acquiescence in a boundary line is as binding as though the legal title had been conveyed to him. *Sheldon* v. *Perkins*, 550.

See COSTS, 1, 2; EVIDENCE, 4.

DOMICIL. *See* EVIDENCE, 7, 8.

DOWER.

1. Under the statute of this State the widow's right of dower becomes a present vested estate on the decease of the husband, which does not depend on the contingency of the dower being assigned or set out. *Dummerston* v. *Newfane*, 9.

2. The lease of a widow's dower by her guardian becomes inoperative by her decease. If an heir in possession under such lease, refuse on demand to let the other heirs into joint occupancy, they may maintain ejectment and recover to the extent of their right including rents and profits. *Stockwell, Prosecutor*, v. *Sargent et al.*, 16.

3. If her administrator should receive and hold the rent the heirs might collect it of him. *Ib.*

4. These rights and remedies of the heirs not in possession are not lost or suspended by an appeal from an order appointing commissioners to make partition of the premises in which the widow had her estate in dower, therefore where the appeal is not prosecuted the heirs cannot recover for the rents and profits pending the appeal, as intervening damages, on a bond given by the lessee in possession to prosecute the appeal and to pay intervening damages. *Ib.*

See HOMESTEAD, 5.

EASEMENT. *See* ADVERSE POSSESSION, 4-8.

EJECTMENT. *See* ADVERSE POSSESSION, 1-3; DOWER, 2; EXECUTORS AND ADMINISTRATORS, 3.

EMANCIPATION. *See* INFANCY, 2.

ESTOPPEL. *See* ARBITRAMENT AND AWARD, 5.

EVIDENCE.

1. It is competent to prove by an officer who was furnished with a subpœna to serve on government witnesses, that they were sent away so he could not summon them; but his testimony that he heard that they were away, and did not look for them, but understood they had been gone a short time, would not be admissible. *State* v. *Barron*, 57.

2. Evidence of general good character is not admissible as a defence in civil cases, except where the question of character is directly in issue and material to the amount of damages—as in slander and seduction—even though the plaintiff's testimony virtually charges the defendant with the crime of embezzlement. *Wright* v. *McKee*, 161.

3. The defendant, an officer, attached a quantity of bark as the property of one Blush, it being in his tan-yard. The plaintiff claimed the bark, and his evidence tended to show that he purchased it of A. and had it delivered at Blush's bark mill to be ground, and that Blush had no title or interest in it. The defendant claimed that Blush purchased the bark of A., and showed, under objection, by the brother of A., that the day A. finished drawing the bark, he, the witness, was at a store near the tannery and A. came from the direction of the tannery to the store and showed him a note for about $75. signed by said Blush and no one else. It appeared from other evidence that the price of said bark was about $75. and that the last of it was drawn about the time the witness testified to seeing the note. *Held*, that the testimony objected to was admissible. *Henry* v. *Huntley*, 316.

4. In a controversy respecting the location of the dividing line between lands of individuals, the declarations of deceased persons, who had actual knowledge as to the location of such line, or who had peculiar means of knowledge, so that it may fairly be inferred that they had actual knowledge of the same, made at a time when they had no interest to misrepresent, and made when upon, or in the immediate vicinity of the line, and when pointing it out, may be received as to the location of such line, when from lapse of time there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject. *Wood et al.* v. *Willard et al.*, 377.

5. *Dictum*, Evidence is inadmissible to impeach the general character of a party as a book-keeper. *Hitt* v. *Slocum*, 524.

6. An affidavit of one of the jurors offered not to show improper conduct in the jury, but merely upon what grounds the verdict was rendered, held inadmissible. *Sheldon* v. *Perkins*, 550.

7. Where the question is to turn upon the character of the defendant's stay or abode in a certain place, whether it was permanent or temporary, evidence of his continued residence there is admissible as tending to prove his intent when he came there and while he remained there. *Hulett, Adm'r*, v. *Hulett*, 581.

8. But the defendant may testify as to his intent in coming there. *Ib.*

9. And he may testify that while remaining there he paid taxes on personal property in another state, in the absence of any evidence as to the law of said state on the subject of taxation of personal property. *Ib.*

10. H. left home in 1849, and was never again heard from. After so leaving home the defendant received certain money due H. as his attorney. *Held*, that in an action for this money by H.'s administrator, the defendant was not a competent

witness under § 24, ch. 36, G. S., but became competent by the act of November 22d, 1864, as the action was pending August 1st, 1863. *Ib.*

11. But if admitted to testify prior to November 22d, 1864, and the case is subsequently heard on exceptions in the supreme court, the act of November 22d cannot properly be urged in defence of such admission on the ground that on the next trial he would be competent. *Ib.*

12. The declarations of a party in his own favor, made after the transaction in question was completed and the parties thereto separated, however short the time, are not admissible in evidence. *Worden* v. *Powers*, 619.

13. They are only admitted when concurrent with the act or transaction of the party, as a part thereof, and to characterize and explain it, when alone and unexplained it might be equivocal in its character. *Ib.*

See ADVERSE POSSESSION, 7; BOOK ACCOUNT, 6, 8; CONFESSIONS, 1; CORPORATIONS, 2; HUSBAND AND WIFE, 9–11; INTOXICATING LIQUOR, 1, 6; JUDGMENT, 1–3; MORTGAGE, 2; NEW TRIAL, 2; PARTNERSHIP, 10; RAMS, 1; RECEIPT, 1; TAXES, 1; TOWNS, 1, 3–5; UNION STORE ASSOCIATION, 1; USURY, 2; WILLS, 4.

EXCEPTIONS.

See PRACTICE, 3, 4.

EXECUTION.

1. The record, in the town clerk's office, of an execution levied upon real estate, and the return thereon, is to be made within the life of the execution and before the return, and if not so made the levy is void. *Little* v. *Sleeper*, 105.

See HUSBAND AND WIFE, 14.

EXECUTORS AND ADMINISTRATORS.

1. If an administrator neglects to seek redress from persons wrongfully withholding the property of the estate which he represents, being deterred therefrom by the wrongdoers' giving him a bond of indemnity against all acts or omissions to act as administrator, he is guilty of collusion with them, and liable for the amount lost to the estate by his bad faith. *Holmes* v. *Bridgman, Adm'r*, 28.

2. If an administrator, after a thorough investigation of the matter, honestly though erroneously believed that certain notes of the intestate were given away by him before his death, and for this reason did not attempt to obtain them or their proceeds, he would not be liable for the amount so lost to the estate. *Aliter*, if he is wanting in due diligence in his investigations. *Ib.*

3. The grantee of an heir holds the land, as the heir did, subject to the administrator's lien; but, even in a case where it is shown that administration was granted upon the estate, it will be presumed, after the lapse of nine years without any interference of the administrator, that his lien has been satisfied, especially when the party denying the right of the heir's grantee is a stranger to the title. *Austin* v. *Bailey et al.*, 219.

4. An administrhtor may sue to recover the price of property belonging to the estate of his intestate and sold by himself personally, without naming himself as administrator, or joining his co-administrator. *Aiken* v. *Bridgman*, 249.

5. In such a case the defendant cannot plead in offset a claim in his favor against the estate of the plaintiff's intestate. *Ib.*

See CONTINGENT CLAIM, 1, 2; DOWER, 3; EVIDENCE, 10, 11; INFANCY, 1; PARTNERSHIP, 8; RECEIPTOR, 2, 3.

FEES. *See* ATTORNEY, 2, 3; SHERIFF, 1.

FENCE. *See* RAMS, 1, 2.

FIRE DISTRICT. *See* CORPORATION, 1–4.

FORCIBLE ENTRY AND DETAINER.

1. In a case of forcible entry and detainer the justices issuing the warrant, authorized by § 4, ch. 46, G. S., should take security f r the costs of prosecution, or the proceedings will be dismissed upon motion. *Whittaker* v. *Perry et al.*, 631.

FRAUD. *See* CONTRACT, 6, 8, 9; EXECUTORS AND ADMINISTRATORS, 1; TRUSTEE PROCESS, 2–6.

FRAUDS, STATUTE OF.

1. D. sold to H. a quantity of apples, and sent several barrels more than H. agreed to take, with notice that what H. could not sell, D. would take back. H. afterwards concluded to take all that D. had sent. They then agreed upon the price of the whole, before unsettled, at $75., and that this sum should remain in the hands of H. as part payment for a lot of poultry which D. was then negotiating to purchase, and finally did purchase of H. *Held*, that the contract for the poultry was binding within the statute of frauds. *Dow* v. *Worthen*, 108.

2. The defendant bargained by parol to sell to the plaintiff two parcels of land and the right to a spring of water, all belonging to the defendant's father, for the aggregate sum of $8000., and guaranteed one parcel to contain one hundred and ninety-six acres. The defendant had such an interest in the property as authorized him to sell it, but it was deeded by the father directly to the plaintiff, by a deed in common form, by description merely, and not by quantity, and the payment was made to the father. The piece guaranteed to contain one hundred and ninety-six acres was deficient in quantity, and the plaintiff brought this suit in assumpsit in a special count on the contract of guaranty, and in the common money counts, to recover the value of such deficiency. *Held*, that the contract of guaranty, being part of the contract for the sale of land, for an aggregate and indivisible consideration, was within the statute of frauds, and, being by parol, could not be enforced by action. *Dyer* v. *Graves*, 369.

3. There could be no recovery on the money counts as no part of the purchase money was paid the defendant. *Ib.*

4. The defendant retained the plaintiff as his attorney in any litigation that might grow out of a conveyance to him by his brother, John Adams, who had failed; and in consideration of such retainer promised the plaintiff verbally to pay him one-half of a debt of three or four hundred dollars, due to the plaintiff from said John,

and also promised to pay the plaintiff for his services, if he performed any. *Held*, that the defendant's promise to pay the debt of John Adams to the plaintiff was a promise within the statute of frauds, and not being in writing could not be enforced by action. That a verbal promise to pay the debt of another, where the original debt still subsists, is never legally binding, except where the promissor has received the funds or property of the debtor for the purpose of being so applied, so that an obligation or duty rests upon him, as between himself and the debtor, to make such payment, whereby his promise, though in form to pay the debt of another, is in fact a promise to perform an obligation or duty of his own. *Fullam* v. *Adams*, 391.

5. The plaintiff contracted by parol with the defendant for thirty-one sheep, at a stated price, to be delivered as he should want them for butchering. The plaintiff received twenty upon the contract and paid for them when delivered. The defendant refused to deliver the remaining eleven sheep, and the plaintiff brought an action for the damages he sustained in consequence of said refusal. *Held*, that there was both an acceptance and part payment, either of which was sufficient to take the contract out of the statute of frauds, and make it binding upon the parties as an executory contract. *Richardson* v. *Squires*, 640.

See CONTRACT, 12.

FREE MASONS.

1. "The Mount Lebanon Royal Arch Chapter" of Free Masons, in 1836, disposed of all their real and personal property, consisting of their hall, furniture and equipment, pursuant to a vote of the Chapter, and for twenty-three years held no meetings, elected no officers, performed no acts required by its laws and rules, and ceased to have any visible sign of existence. *Held*, that the legal existence of the Chapter was gone, and that it was beyond the power of the State Chapter to restore it to life so as to preserve for it a continued existence from 1836. *Strickland et al.* v. *Prichard et al.*, 324.

2. A rule of the association that officers elected should hold their offices till others were elected, could not operate in a case of this kind to preserve its legal existence. *Ib.*

GIFT. *See* INFANCY, 1.

GOOD FAITH. *See* JURISDICTION.

GRAND LIST. *See* LISTS AND LISTERS; TAXES, 2, 3.

GUARANTY. *See* CONTRACT, 14; FRAUDS, STATUTE OF, 2.

HIGHWAYS.

1. A party having suffered injury by the insufficiency of an highway, is not bound to establish in the outset as a distinct affirmative proposition, that he was guilty of no negligence on the occasion. *Hill, Adm'r*, v. *New Haven*, 501.

2. The question whether his negligence contributed to his injury is one of fact for the jury. *Ib.*

See HUSBAND AND WIFE, 8; PLEADING, 6.

HOMESTEAD.

1. Where the sum of $500. has been actually invested in land as a homestead, and changed into money, or a right of action by process of law, *in invitum*, and then kept as a separate homestead fund, not commingled with other moneys, and no intent shown to apply it to other uses, it is held to be exempt from attachment. And this is held to apply to a debtor coming to this state and bringing the fund with him from another state whose laws protect it to the same extent as our own. *Keyes* v. *Rines, Tr. and Cl.*, 260.

2. The defendant's wife signed a deed of their homestead, sold under process of law in New Hampshire, upon condition of the payment of the proceeds to her, to be kept by her as a separate fund for a future investment in a homestead, free from all interference of her husband. *Held*, that she thereby acquired title to the money and held it free from attachment on her husband's debts. *Ib.*

3. Subsequently her son-in-law purchased a farm for $1700., and it was agreed that one-half of it should be deeded to her, and for half the purchase money she was to pay in the $400. received for the homestead, and her two sons were to make up the balance, but living South, were prevented from completing the payment by the breaking out of the rebellion; but she paid the $400. to her son-in-law, and with her family moved on to the place, and he, as a temporary arrangement and waiting the completion of the bargain, gave her his note for the amount. *Held*, that this money may be regarded as already by agreement invested in the land, and the note was rather in the nature of a receipt than a promise to pay, therefore not liable to attachment on the defendant's debts. ALDIS, J., dissenting. *Ib.*

4. The husband cannot by will devise the homestead right away from his wife and minor children. *Meech* v. *Est. of Meech*, 414.

5. No distinction can be made as to the rules applicable to dower and homestead, when the question of election between them and a will arises. *Ib.*

6. The testator devised by will to his wife for life four acres of land which included the family mansion and grounds. Then a larger tract comprising the four acres within its boundaries is devised in fee to a son, Ezra, with this clause appended to the description:—"excepting from the lands herein devised to Ezra the life estate which I have given to my wife, in about four acres thereof, and the lands and buildings standing on the four acres." The house on the four acres was the homestead, from which the widow's homestead must be taken if she have any. The will stated that the provision for the widow was to be in lieu of dower, and it is *held*, that it was plainly intended to be in lieu of homestead also. *Ib.*

HUSBAND AND WIFE.

1. A married woman contracting a debt for her own benefit, may make it an express charge on her separate estate, and her mortgage for that purpose will be supported in equity. *Frary et al.* v. *Booth et al.*, 78.

2. A husband may by his acts, as well as by express agreement, divest himself of his marital rights in his wife's property so as to make it her separate estate. *Ib.*

3. A wife left her husband in 1847. In 1852, property was devised to her, which she occupied and controlled without any interference of her husband until the present time. In 1857 she made a mortgage upon her estate to secure payment of a debt for necessaries for the support of herself and children, and in 1858 she obtained a divorce and made a second mortgage on the same property. *Held*, that though as between her and her husband the devise to her lacked the affirmative words necessary to constitute a separate estate in the strict meaning of the terms, yet under the circumstances it was to be considered her separate estate as between her and the first mortgagee. *Ib.*

4. Such first mortgage may also be supported in equity on the principle that where a married woman trades as a *feme sole*, or obtains credit on her separate estate, a court of equity will hold the proceeds of the business or the estate subject to the claims of her creditors. *Ib.*

5. Or on the principle that the estate of a married woman living apart from her husband is liable for her maintenance. *Ib.*

6. The second mortgage having been made with notice of the circumstances, has no equity to come in before the first. *Ib.*

7. The statutes of Vermont, in regard to the conveyance of married women's estates, do not affect the jurisdiction of the courts of equity over the subject of separate estates. *Ib.*

8. In this state, a husband, by a suit in his own name alone, may recover of a town for loss of service and expense resulting from an injury to his wife caused by a defect in the highway. *Whitcomb* v. *Barry*, 148.

9. The plaintiff, being an infant, commenced and prosecuted his action by his father as his natural guardian, who was not a party to the subject matter of the litigation. *Held*, that the guardian's wife was a competent witness. *Bonett* v. *Stowell*, 258.

10. Where the work which the wife does, or the business she carries on, gives notice to all, by its very character and nature, that she is authorized by her husband to carry it on, and is the party to deal with, the case comes within the statute of 1858, (G. S., p. 327, § 27,) which provides that married women may testify for or against their husbands in certain cases. *Orcutt* v. *Est. of Cook*, 515.

11. The hiring out of a minor son to labor is not a business of such character; and in the absence of all proof of authority to the wife to make the contract, or of ratification of it, by the husband, the wife was held to be an incompetent witness. *Ib.*

12. The effect of ratification alone not decided. *Ib.*

13. The mere fact that a husband signed a note with his wife, given for money to pay in part for land deeded to the wife, when it does not appear that any reliance was, or could be placed upon his paying it, and the note was secured wholly by mortgage of her lands, and those of her relatives, is not enough to show that he had any real or equitable interest in the premises that could be taken by his creditors. *Buck* v. *Gilson et al.*, 653.

14. If a party having recovered judgment against another, levy execution upon land deeded to his wife, the husband never having held the title, the former would not

by his levy acquire a legal title so that he could maintain ejectment or trespass qu. cl. upon it, whatever interest the husband may have had in the land, or whatever design in having the wife hold the title. *Ib.*

See HOMESTEAD, 1—4; PAUPER, 2; RAMS, 4; USURY, 1—3.

ILLEGAL CONTRACT. *See* CONTRACT, 10; USURY.

ILLEGAL FEES. *See* SHERIFF, 1.

INDICTMENT. *See* PERJURY, 1—3.

INFANCY.

1. An absolute gift of articles of personal property made by an infant, can be revoked or avoided by him, or by his administrator. *Person, Adm'r, v. Chase*, 647.

2. Emancipation of an infant by his father does not enlarge or affect his capacity to make a contract. *Ib.*

See PAUPER, 5.

INTEREST.

1. By an arrangement between all parties interested the defendant bought a store of goods that had been attached, and gave his receipt therefor. It was stipulated in the receipt, and agreed upon independent of the receipt, that the defendant should not be called upon for payment until a suit pending about the ownership of said goods was decided. *Held*, that under either aspect of the case no interest was allowable until demand of payment and refusal; as no implied contract to pay interest arises, except where the party has neglected to make payment after it was his duty to do so. *Evans v. Beckwith*, 285.

2. The plaintiff's intestate became the owner of the land in question by devise, but charged with the payment of $100. to each of his brothers and sisters living at the decease of M. Subsequently the intestate conveyed the land to F., who executed to the intestate a bond that on the decease of M. he would pay these legacies to the said legatees, if then living, and if any died before the decease of M., the share of such to the intestate, and secured the payment of the bond by a mortgage of the same land to the intestate. One of the intestate's sisters died previous to M.'s death, and the $100. that became due the intestate by the terms of the bond was never paid, nor was any demand made for it until about the time of bringing this suit. *Held*, that the intestate was entitled to have interest added to said sum from the decease of M., as a charge or incumbrance on the land in the hands of the defendant, to whom it came by several intermediate conveyances from F., the death of M. being an event equally within the knowledge or means of knowledge of the defendant as the plaintiff. *Sumner, Adm'r, v. Beebe*, 562.

INTOXICATING LIQUOR.

1. In a prosecution for furnishing intoxicating liquors contrary to law, the government had proved by several witnesses that they had drank liquor in rooms in

the respondent's public house on public occasions, when asked to do so by parties occupying such rooms, but did not know where the liquor came from. *Held*, that evidence on the part of the respondent to show the habit of gentlemen, in travelling about the country, to carry spirituous liquors in bottles with them, was inadmissible. *State* v. *Barron*, 57.

2. *It seems*, that the rule is well settled in this state that in criminal cases the jury are the judges of the law. *Ib.*

3. Whether *ale* is intoxicating or not is not a question of law, but of fact, and the question may be submitted to the jury without evidence to show that it is intoxicating. *Ib.*

4. Where liquor is furnished in answer to a single call, at the same time, and by a single act, it can constitute but one act of furnishing, and the party incurs but one penalty, notwithstanding it may be drank by more than one person. But where the liquor is furnished either on a single call, or more, if it be done at different times and by separate acts, no matter how closely these several acts may follow each other in point of time, each act of furnishing constitutes a separate offence, and subjects the party to a separate penalty, whether the liquor be all drank by the same person or by different persons. *Ib.*

5. If a merchant does not keep intoxicating liquor for sale at his store, but makes himself an agent and carrier merely, to procure it for division and distribution among his customers, he is guilty of a violation of the statute prohibiting the sale of intoxicating liquors. *State* v. *Buck*, 657.

6. Under a complaint for selling liquor the state or respondent may show any conversation that took place between the latter and the buyer pertaining to the transaction at the time of it. *Ib.*

See TOWNS, 5, 7, 8.

JUDGMENT.

1. Where the record of a judgment shows that the writ issued against four defendants but service was made on two only, and proceeds as follows: "And at the same term come the said defendants by their attorney," naming him, and then goes on to state the proceedings to a final judgment against the defendants, without naming them after the recital or copy of the writ and return, it is *held*, that the record shows an appearance for those defendants only upon whom service had been made. *Hubbard, Adm'r*, v. *Dubois et al*, 94.

2. In an action upon a judgment rendered upon the report of an auditor, it is *held*, that copies of the auditor's report and of the rule, citation, and officer's return thereon, are admissible in evidence, not to contradict the record, but in connection with and as aiding to explain the meaning of the record itself when that is doubtful or equivocal. *Ib.*

3. The record of the justice showed a judgment by confession. *Held*, that parol evidence offered by a subsequent attaching creditor to show that the defendant never appeared personally before the justice is inadmissible, the record of the judgment being conclusive. *Farr* v. *Ladd et al.*, 156.

See TRUSTEE PROCESS, 1.

JURISDICTION.

1. Where the damages are open, or depend upon an estimate or appraisal, or the valuation of property, a motion to dismiss the suit for want of jurisdiction is ad-

dressed to, and rests in, the discretion of the county court, and the decision of that court upon that question cannot be reviewed in the supreme court. *Clark, Adm'r,* v. *Crosby,* 188.

2. Where on the face of the plaintiff's declaration the county court had jurisdiction, but upon his own evidence it appeared that his demand had been reduced by payment to fifty-six dollars, it was *held,* that this court had not original jurisdiction. *Miller* v. *Livingston,* 467.

See PLEADING, 1.

JURORS. *See* EVIDENCE, 6.

JUSTICE'S RECORD. *See* JUDGMENT, 3.

LANDLORD AND TENANT.

1. Under a provision in a lease of a farm upon shares, that the lessor is to have one-half of the gross proceeds of the farm in lieu of interest, "and to have as much property and value in hay, seed, teams, tools and stock returned to the lessor at the expiration of said contract as he puts on to said farm and delivers over to the lessee," it was *held,* that the lessee was bound to return the property he received, or its equivalent in value, even though the loss or depreciation was wholly without his fault. *Smalley* v. *Corliss,* 486.

2. But where a portion of the stock was disposed of during the term of the lease by mutual consent, at a price less than the appraisal when the lessee received it, and the lessor received the proceeds, the lessee is not bound to make up for the deficiency. *Ib.*

LAWS.

1. Laws that change and modify remedies, forms of proceedings, or the tribunal itself, are recognized as valid, provided they do not directly, or indirectly, destroy or abolish all remedy whatever by which the performance of any class of valid legal contracts may be enforced. *Richardson, Adm'r* v. *Cook et al., Ex'rs,* 599.

LEASE. *See* LANDLORD AND TENANT.

LEVY. *See* EXECUTION, 1.

LICENSE. *See* ADVERSE POSSESSION, 4.

LIMITATIONS, STATUTE OF.

1. Under the second clause of § 15, ch. 63, G. S., the time of the debtors *residence* out of the State, is deducted in computing the period of the statute of limitations, although he was absent from and resided out of the state when the cause of action accrued. *Davis, Adm'r,* v. *Marshall,* 69.

2. Construction given to § 15, ch. 63, G. S. *Ib.*

3. The plaintiff's note, in which he promised to pay S. "four hundred dollars in produce or wood from the farm on demand as he may want to use the same," had run for over twelve years without any demand having been made. *Held*, that it was not barred by the statute of limitations. *Stanton* v. *Est. of Stanton*, 411.

4. Where the instrument itself indicates that the calls for payment are to be indefinitely prospective, and to be made as may suit the wants and convenience of the payee, there is no ground furnished upon which the law can assume any fixed point, as a limit to reasonable time for making a demand, and therefrom give operation to the statute of limitations. *Ib.*

5. The statute, § 25, ch. 63, G. S., providing, that "no acknowledgment or promise shall be held to affect any defence made under the provisions of this chapter," (relative to limitations of actions), "unless such acknowledgment or promise shall be in writing signed by the party affected thereby," held to be prospective, and not retrospective, in its action, therefore not applicable to a case pending when said statute took effect. *Richardson, Adm'r*, v. *Cook et al., Ex'rs*, 599.

6. When the plaintiff called on the defendant for the pay on the note in question, the defendant "told him he ought to have his pay, that it was right he should have it, but that he had lost a good deal in the business and was not worth anything and could not pay it." *Held*, that under the rule established in *Phelps* v. *Stewart*, 12 Vt. 256, this acknowledgment was not sufficient to take the case out of statute of limitations. *Galpin* v. *Barney*, 627.

7. B. had given the note in question as the agent of the defendant, though in fact the business was his own, and the defendant had no interest therein, and after the agency terminated and the defendant had refused to pay the note, B., upon being called upon by the holder to give a new note, refused, saying he had no authority but paid and endorsed a dollar on the old one. *Held*, that this did not renew the note as against the defendant. *Ib.*

See ASSIGNMENT, 3; USURY, 8.

LIQUOR. *See* INTOXICATING LIQUOR.

LISTS AND LISTERS. *See* SCHOOL DISTRICT, 4—6; TAXES, 3.

LOTTERY.

1. By artifice and falsehood the plaintiff got possession of a gift enterprise ticket, so called, belonging to W., a minor, which entitled the holder to certain articles, and when drawn took them into his possession. The defendant, an officer, then attached and carried away said articles upon a writ in favor of W.'s father against the plaintiff, by the father's direction, and delivered them to his possession. He, the father, then discontinued his suit, having instituted it merely to get possession of said articles. *Held*, that in the absence of proof to the contrary, the defendant is entitled to the presumption that he acted in good faith, and strictly within the limit of his official duty, in serving said writ as he did; that upon a discontinuance of said suit, it was his duty to deliver the property to the person legally entitled to it: and that the property clearly belonged to W. *Mullen* v. *Sherman*, 493.

MARRIED WOMEN. *See* HUSBAND AND WIFE.

MINISTER RIGHT. *See* CHANCERY, 2.

MORTGAGE.

1. The deed and bond in question in the present case are held to have the effect of a security in the nature of a mortgage, to which the right of redemption attaches; and this right cannot be waived by agreement. *Wing, Ex'r,* v. *Cooper et al.,* 169.

2. Parol evidence is not admissible to show that an instrument on its face a mortgage was intended by the parties to operate as a conditional sale, or to turn the real transaction into one of a different character. *Ib.*

3. A power of sale in a mortgage is in practice unusual if not unknown in this state, and ought not to be recognized in any case unless conveyed by an express grant and in clear and explicit terms. *Ib.*

4. Gleason, being liable to an accounting, was properly joined as a party defendant, and even if not, it was apparent on the bill itself, and the objection, if not made by demurrer to the bill or in the answer, should be considered as waived and as coming too late when made at the hearing. *Ib.*

See ARBITRAMENT AND AWARD, 3; ATTACHMENT; CHATTEL MORTGAGE; HUSBAND AND WIFE, 1—7; INTEREST, 2; TRUSTEE PROCESS, 8—11.

NEW TRIAL.

1. The power of the supreme court to grant new trials on the ground that the verdict was against the weight of evidence, should be confined to the court before which the case was tried. *Hill, Adm'r,* v. *New Haven,* 501.

2. A motion for a new trial is addressed to the discretion of the county court, and their decision upon it, whether right or wrong, cannot be revised on exceptions. But if the court improperly reject evidence offered in support of the motion this would be an error revisable on exceptions. *Sheldon* v. *Perkins,* 550.

NON COMPLIANCE. *See* CONTRACT, 1, 2.

NONSUIT. *See* PRACTICE, 5.

NOTICE. *See* ADVERSE POSSESSION, 6, 7; AGENCY, 2; APPEAL; COSTS, 3.

OFFSET. *See* SET OFF.

PARTIES. *See* ACCOUNT, 5; ASSIGNMENT, 5; ATTACHMENT, 2; BANKS, 1, 2; CONTRACT, 16; EXECUTORS AND ADMINISTRATORS, 4; MORTGAGE, 4.

PARTITION. *See* DOWER, 4.

PARTNERSHIP.

1. P. was one of the originators, and had for several years been an active member, and one of the directors, of a mercantile association, called the N. E. Protective Union, Div. 172. Finally he moved away and ceased to do any business with the association, and supposed he had ceased to be a member of it, but notified no one

of his purpose to withdraw. *Held*, that as between himself and the other members he had not ceased to be a member of the division. *Tenney et al.* v. *N. E. Protective Union*, 64.

2. But if he had, still if he was a member when the dealings between the plaintiffs and the division began, and the plaintiffs knew it, they were entitled to treat him as a member until they were notified that he had withdrawn. *Ib.*

3. The death of a member would not work a dissolution of the association, as it was designed in its organization to have perpetuity. *Ib.*

4. The plaintiff's intestate and defendant entered into a joint enterprise for buying stock on commission, under an agreement that the intestate's commissions should be paid to a firm, of which the defendant was a member, in liquidation of a debt that the intestate owed the firm. This action was brought to recover the intestate's commissions. After his death said firm presented their claim for said debt to the commissioners and the same was allowed, the firm giving no credit for the intestate's commissions in the hands of the defendant. *Held*, that this was a waiver of the defendant's right to insist on said agreement as a defence to this action. *Newell, Adm'r*, v. *Humphrey*, 265.

5. The plaintiff is entitled to recover for commissions on purchases incomplete at the intestate's death, but carried out subsequently by the defendant, in respect to which the partners in said enterprise had spent time and incurred expense prior to the intestate's death. *Ib.*

6. Under an agreement between the parties at dissolution, that the defendant should take and collect the partnership demands, and pay to the plaintiff one-half the sum realized therefrom, after deducting the expenses of collecting, the defendant sent out his agent, H., to collect the same, and paid him therefor two dollars per day and expenses, the same as he had been paying him previously. Had H. continued in the defendant's individual business while engaged in collecting these demands, his services would have been worth four dollars per day to the defendant. *Held*, that the defendant should be allowed what it cost him to collect said demands, not what profits he would have gained by employing H.'s time in other business. *Porter* v. *Wheeler*, 281.

7. The action of account was the proper action to settle and adjust the respective rights of the parties in said transaction. *Ib.*

8. Thrall & Pond had been law partners and as such had been retained by the defendant's intestate in certain suits. Pond sold out to the plaintiff Smith, and Thrall and Smith formed a new partnership, but Smith did not acquire the right to be substituted for Pond as partner with Thrall in their subsequent services in those suits without the consent of Thrall; but the services were rendered by the new firm Thrall & Smith, jointly, Smith preparing and arguing the cases, and making the charges on the company books as other company business. This was done with the full knowledge of Thrall and the intestate, and without objection on the part of either. *Held*, that neither Thrall nor the intestate's administrator can now make objection that the claim for said services, is not a joint claim of Thrall & Smith. *Thrall & Smith* v. *Seward, Adm'r*, 573.

9. After the intestate's death Thrall claimed these charges (being the items in dispute) before the commissioners as a several demand in his favor, and Smith as a partnership demand. Thrall's claim was allowed and paid, he giving a release under seal for the firm Thrall & Smith, though long after its dissolution. *Held*, that as the facts in the case do not show that the payment to Thrall was a fraud on Smith, the payment was valid and the release binding upon the firm. *Ib.*

10. *Held*, that Smith was a competent witness to testify on the part of the plaintiffs relative to the contract or understanding between Smith and Thrall as bearing upon the question whether these items were a partnership claim. *Ib.*

See BOOK ACCOUNT, 7; ACCOUNT; UNION STORE ASSOCIATION.

PATENT RIGHT. *See* PROMISSORY NOTE, 3.

PAUPER.

1. The decision in the case of *Londonderry* v. *Acton*, 3 Vt. 122, where it is held that one is not liable to be removed as a pauper while owning and occupying a freehold estate, approved. *Dummerston* v. *Newfane*, 9.

2. Where a wife has a freehold estate in dower, though not assigned, in a piece of land which adjoins the farm upon which she lives with her present husband, and has so lived since their marriage, and which has been occupied and improved by them together in connection with the said farm, and has contributed towards her support, it is *held*, that she is so far in the actual possession and occupancy of said land as to be irremovable from it as a pauper; and while she and her husband continue to live together he cannot be separated or removed from her under an order of removal. *Ib.*

3. The certificate of the justices upon the copy of an order of removal of a pauper to be served upon the overseer of the poor of the town to which the pauper is ordered to be removed, is an indispensable requisite, and a constituent part of the process to be served, and without it the statute, § 11, ch. 20, G. S., is not complied with. *Sharon* v. *Strafford*, 74.

4. If wanting, the defect cannot be cured by amendment. *Ib.*

5. The pauper act of 1801 *held* to apply to minor children after marriage, though not before, on the ground that marriage emancipates the minor. *Sherburne* v. *Hartland*, 528.

6. The defendant's intestate for several years received aid from the town as she needed it, in the same manner as other poor persons, no charge being made for the same. In 1858 she obtained a pension by aid of an attorney employed by the town at her request. Prior to this she frequently expressed to the overseers and others who assisted her in behalf of the town, a regret of her inability to pay for the aid she was receiving, and, subsequently, she frequently promised them that she would remunerate the town so far as she might be able, and that she wanted what was left of the pension money at her decease to go to the town. The pension money was drawn each year by the agents of the town and invested for her, and no portion thereof was retained or used by the town, or by the intestate, except the interest, which she used for her support. Upon the death of the intestate, the town presented a claim for the aid furnished. *Held*, that the question whether the parties understood that this support was furnished under a contract for repayment, or under statutory obligation, was one of fact, to be found by the auditor to whom the case was referred, and the allowance or disallowance of items determined how the auditor regarded the fact to be in respect to each. *Benson* v. *Hitchcock, Adm'r*, 567.

7. *Held*, that her expressions of regret and gratitude created no legal obligation on her part; nor were her promises to pay, under the circumstances, conclusive. *Ib.*

PAYMENT. *See* ATTACHMENT, 3; PARTNERSHIP, 9; PROMISSORY NOTES, 1, 2.

PERJURY.

1. An indictment for perjury alleged that "Eliza E. Carpenter, on the 25th June, 1860, brought a petition of divorce, addressed to the supreme court then next to be held," &c., "setting forth in said petition," &c., and then states the substance and prayer of the petition for a divorce, alimony and the custody of the child. It then proceeded as follows: "whereupon it became necessary to take the testimony of witnesses in the premises," and then states that the respondent "appeared before Henry N. Worthen, a notary public, and made his deposition as to facts in the premises," &c. *Held*, that the indictment sufficiently connected the false evidence with the petition, and that the words "brought a petition of divorce to the supreme court," or "petitioned the supreme court," sufficiently averred the pendency of the suit in court to make it a judicial proceeding. *State* v. *Sleeper and State* v. *Magoon*, 122.

2. And the indictment also averred,—"it became and was material to show whether the said Sleeper was at the house of L. D. Carpenter on the morning of the second of November, A. D. 1859, and whether he then had a conversation with said Carpenter, in the presence of certain other persons," and then proceeded to allege that the respondent "falsely, corruptly and wilfully" swore "that on the morning of Nov. 2d, 1859, he stopped at said Carpenter's house and had conversation with Carpenter in the presence of one Magoon and the said Eliza E. Carpenter," &c. *Held*, that it was sufficiently alleged that this evidence was material. It need not appear in addition how it was material. *Ib.*

3. The allegation that the respondent "falsely, corruptly and wilfully" swore is sufficient without the word "knowingly." *Ib.*

PLEADING.

1. A plea by the *town* that the money which the plaintiff is seeking to recover, was collected of him by the constable, named, upon a rate bill and warrant duly issued, &c., would not give the county court appellate jurisdiction, where it did not exist upon other ground. *May* v. *Jamaica*, 23.

2. In this state it is not only necessary to demur specially to the defect of duplicity, but the particular in which the duplicity is claimed to exist must be set out. *Carpenter* v. *McClure*, 127.

3. Where a declaration alleged that a horse was warranted sound except as to a specified defect, and did not allege that the effects of this defect were other than and beyond what was obvious, and operated as a breach of the warranty, it was *held*, that the plaintiff could not recover under such declaration for any unsoundness caused by said defect. *Morrill* v. *Bemis*, 155.

4. If a count in trover against a carrier sets forth the business of the defendant, and his negligence and the loss thereby, it will be sufficient without setting forth his duty as carrier. *Wright* v. *McKee*, 161.

5. Where a writ is defective in not being signed by a public officer—a justice of the peace or clerk of the court—and the defendant appears and pleads to the merits, and makes no objection upon the ground that he was not duly summoned, he waives this ground of objection. Objection for such defect must be presented at the first opportunity. *Huntley* v. *Henry et al.*, 165.

6. Where the declaration in an action for damages, under §§ 15, 16, 17, ch. 52, G. S., alleged the time of the decease of the party, which was within two years before the commencement of the action, without specifically alleging that it was within two years before the action was commenced, it was *held*, sufficient after verdict. *Hill. Adm'r*, v. *New Haven*, 501.

7. Where a plea is filed in the justice court and an appeal taken, the defendant may, but need not, file a new plea in the county court. *Whittaker* v. *Perry et al.*, 631.

8. A plea in abatement, defective in form as such, may be sufficient as a motion to dismiss for want of a recognizance for costs. The plea in this case so held. *Ib.*

See ACCOUNT, 1, 2, 5; ASSIGNMENT, 4, 5; CHANCERY, 1, 2; CONTRACT, 7; COSTS, 1; EXECUTORS AND ADMINISTRATORS, 4, 5; HUSBAND AND WIFE, 8; MORTGAGE, 4; PARTNERSHIP, 1, 7; PAUPER, 3, 4; PERJURY, 1—3; PRACTICE, 1, 2; PROMISSORY NOTES, 6, 7; TOWNS, 6; TROVER, 4; TRUSTEE PROCESS, 16, 17; USURY, 1—3.

POWER OF SALE. *See* MORTGAGE, 3.

PRACTICE.

1. If a party claims that an error has been committed upon the trial, against his legal rights, he must make it appear affirmatively upon the record. *Beard* v. *Murphy*, 99.

2. An action in a case of open damages is considered as still pending after the entry of a default until the assessment of damages; and if the defendant dies before the assessment, and commissioners are appointed, the case will be subject to discontinuance under the provisions of § 16, ch. 53, G. S. *Sheldon* v. *Sheldon & Tr.*, 152.

3. Exceptions to a charge must be taken, if at all, at the close of the charge, and before the jury retire from the jury box. *State* v. *Clark*, 471.

4. It is not the duty of the court to instruct the jury that they must not hold the law to be more unfavorable to the respondent than the court charged. *Ib.*

5. All applications for relief against *defaults* or *nonsuits* in the county court must be made in the county court which ordered them. *Montgomery* v. *Vinton*, 514.

See APPEAL, 1; CHANCERY, 1, 3; CONTRACT, 9; HIGHWAYS, 1; MORTGAGE, 4; NEW TRIAL; PLEADING, 5; REFEREE, 1; TRUSTEE PROCESS, 1.

PRESCRIPTION. *See* ADVERSE POSSESSION.

PRESUMPTION. *See* LOTTERY.

PRINCIPAL AND AGENT. *See* AGENCY.

PRINCIPAL AND SURETY. *See* PROMISSORY NOTES, 4—8.

PRIVATE SCHOOL. *See* SCHOOLS.

PROBATE COURT. *See* APPEAL, 1.

PROCESS. *See* TRUSTEE PROCESS, 1, 7; PAUPER, 3.

PROMISSORY NOTES.

1. The plaintiff's evidence tended to prove that, upon the defendant's request the plaintiff received of the defendant two notes against the defendant's son, and $100. to be paid to a creditor of the defendant's son, and gave his note to the defendant for the amount of the two notes and the $100., after deducting $30. which the defendant owed the plaintiff for a colt; that this was done upon the repeated assurance of the defendant that the plaintiff should not lose by the transaction; that the defendant promised the plaintiff not to call on him for payment until he should have collected it of the son; that the plaintiff made a small payment on said note, and then took it up by giving a new note for the balance payable on demand; that the defendant transferred the new note to R. who called on the plaintiff for payment, and he paid the amount without attempting to defend against it. *Held*, that the plaintiff's evidence did not show a case of voluntary payment of a note legally invalid for want of consideration. *Taggart* v. *Rice*, 47.

2. Instead of the plaintiff's evidence making a case of no consideration in the note, it was a case of an independent counter-claim on the part of the plaintiff against the defendant, and as such the plaintiff was not bound to set it up in defence, or lose it. *Ib.*

3. The utter worthlessness of a patent right on account of a defect in the principle of its construction, will constitute a full defence to a note given for the purchase price, between the original parties thereto, notwithstanding the patent may have been legal. *Clough* v. *Patrick*, 421.

4. It is no defence for a surety upon a note that the principal got it discounted by a different party from the one agreed upon with the surety. *Briggs* v. *Boyd*, 534.

5. The plaintiff and defendant signed the note in question as sureties with the principal, R., payable to H., or order, and knowing that H. was only to indorse it, not to sign it with them. *Held*, that H. was not subject to contribution as a surety. *Ib.*

6. If a surety has no notice of a suit against a co-surety, he is not bound by the judgment; and may therefore show in a suit against himself by the co-surety for contribution, any legal defence which he might have pleaded in bar of a suit upon the note. *Ib.*

7. But he cannot set up a partial failure of consideration, not subject to computation, between the original parties as a defence *pro tanto*. *Ib.*

8. A surety may recover in a suit against a co-surety for contribution a proportionate share of the taxable costs which he had to pay in the suit upon the note against himself, both being equally in fault in not paying the note. *Ib.*

See CONTRACT, 6; HOMESTEAD, 3; HUSBAND AND WIFE, 13; LIMITATIONS, STATUTE OF, 3, 6, 7; TROVER, 2, 3; TRUSTEE PROCESS, 4; USURY, 1, 5, 7.

PRUDENTIAL COMMITTEE. *See* SCHOOL DISTRICT, 7, 8, 9; SCHOOLS, 1.

RAILROAD.

1. The statute, § 55, ch. 28, G. S., requiring the bell on locomotive engines to be rung or the whistle blown for a certain distance at crossings, imposes a duty on railroad companies, not only in reference to persons approaching or in the act of passing the crossing, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing train. *Wakefield* v. *Conn. & Pass. R. R. R. Co.*, 330.

2. There might be cases where the company would be excused from complying with the statute, but in case of injury by reason of such omission, the company must show that it was reasonable and prudent. *Ib.*

RAMS.

1. In an action to recover the penalty under the statute § 6, ch. 104, G. S., providing for the restraint of rams, evidence in respect to the character of the fence through which the ram escaped, or between the land where the ram was pastured and the land to which he escaped, is not admissible. *Town* v. *Lamphire*, 52.

2. The owner or keeper of a ram is bound to restrain him at all events, during the season prescribed, and can not rely for a defence upon the promise of an adjoining owner to keep up a legal fence. *Ib.*

3. When two or more rams owned by different persons escape together, to the sheep of another, the owner of each is liable to a penalty for the escape of his own ram, and the payment by one of the penalty that he is subject to, for the escape of his ram, is no discharge of the liability of the others. *Ib.*

4. The plaintiff's wife was a competent witness in this case on the ground of being an agent for her husband. *Ib.*

RECEIPT.

1. Receipts not under seal are always open to explanation and even to contradiction by parol evidence. They are not contracts, so as to be the exclusive evidence of the intention of the parties. *Hitt* v. *Slocum*, 524.

See INTEREST, 1; RECEIPTOR.

RECEIPTOR.

1. There is no duty cast upon the receiptor of property attached to return it, and no cause of action arises against him on his receipt, until a demand is made for the property, which must be within the life of the execution. *Carpenter* v. *Estate of Snell*, 255.

2. Where no demand is made upon the receiptor in his lifetime, it must be made upon his personal representative before the cause of action can be considered as perfected against his estate. *Ib.*

3. An application to the administrator to consent to an opening of the commission so that a claim upon a receipt for property attached, made by the intestate, could be presented, is not equivalent to a demand of the property. *Ib.*

RECOGNIZANCE. *See* FORCIBLE ENTRY AND DETAINER; PLEADING, 8.

RECORD. *See* EXECUTION, 1; JUDGMENT, 1, 2; TOWNS, 1.

REFEREE.

1. Where parties present to the court an agreed statement of facts, a referee can only find such facts as are the legal result of the facts agreed upon, or as are naturally and legally deducible from them. *Meech* v. *Est. of Meech*, 414.

RELEASE. *See* PARTNERSHIP, 9.

RENTS AND PROFITS. *See* DOWER, 3, 4.

RESIDENCE. *See* EVIDENCE, 7, 8.

REVENUE STAMP. *See* STAMP, 1.

SALE. *See* AGENCY, 2; MORTGAGE, 2; SHERIFF'S SALE, 1, 2.

SCHOOL DISTRICT.

1. An article in the warning of a town meeting as follows: "To see if the town will make alterations in school districts when met," *held* sufficient to warrant the consideration by the town in town meeting of any proposed changes in the limits of existing school districts. *Orcutt* v. *Chase*, 196.

2. *It seems*, that all property subject to taxation should, for school district purposes, be assessed and set in the list of the district within which it had its *situs* at the time with reference to which the assessment should be made, and not elsewhere. *Ib.*

3. A vote of the town to set off the plaintiff's farm upon which he resides from one school district to another, no time of severance and annexation being specified, would take effect from its passage. *Ib.*

4. But the property represented by the plaintiff's list, being a part of the basis of taxation in the former district, would be subject to all school district taxes legally voted or assessed upon it previously in that district. *Ib.*

5. Where the vote to set off said farm was passed May 12th, 1860, it should, in the list of that year have been designated as belonging to the former district for taxation purposes. *Ib.*

6. But an error of the listers in setting it to the latter district would not be conclusive of the plaintiff's, or the district's right, if the town records furnished the necessary means of correcting it. *Ib.*

7. It had been the custom of a school district to apportion the wood for the school to the scholars, and to sell the right of furnishing the deficiency, if any, to the lowest bidder. *Held*, that this custom was not binding upon the prudential committee, and that he might furnish the deficiency himself and charge the price to the district. *Norton* v. *School District*, 521.

8. But having furnished the wood, he would have no right to assess the amount upon the scholars, or the district, without a vote of the district authorizing him to do so. *Ib.*

9. *Held*, that the prudential committee might compromise and pay a claim for a couple of blackboards which the plaintiff had allowed the district to use until one of them was worn out. *Ib.*

SCHOOLS.

1. If a prudential committee agree to let a party have the district school house for a private school during a vacation of the usual district school, and the party act upon the agreement, the committee cannot revoke it, without cause, nor can he allege his want of legal authority to make it in an action of trespass against him for forcibly preventing the party from continuing his school during the period agreed upon. *Russell* v. *Dodds*, 497.

SET-OFF. *See* AGENCY, 2; EXECUTORS AND ADMINISTRATORS, 4, 5.

SHERIEF.

1. If a sheriff serving process charge and receive fees for services not enumerated in the statute, in good faith and with no intent to violate the law, he is not liable to the penalty imposed by statute, § 17, ch. 125, G. S., for taking illegal fees. *Haynes* v. *Hall*, 20.

2. The sheriff, but not the deputy is liable for the loss of property attached by the deputy, and left in an unsafe and unsuitable place, whence it was stolen. *Buck* v. *Ashley*, 475.

3. The deputy is not liable for a mere *non feasance*. *Ib.*

4. The property being stolen, and so beyond the control of the deputy, his refusal to deliver it to the party entitled to it when demanded, was neither a conversion nor evidence of conversion. *Ib.*

See LOTTERY, 1.

SHERIFF'S SALE.

1. The plaintiff's property was attached, and, at the request of the attaching creditor, sold under the provisions of § 41, ch. 33, G. S., but the officer did not give the plaintiff *written* notice of the application. *Held*, that the sale was illegal although the plaintiff had *verbal* notice and was present at the appraisal and sale, and did not object. *Walker* v. *Wilmarth*, 289.

2. Where an officer attaches and holds property lawfully, but sells it illegally, it having deteriorated without his fault, in an action on the case he is liable only for its value at the time of the sale. *Ib.*

SOLDIERS' VOTING ACT, CONSTRUCTION OF. *See* APPENDIX, 665.

STAMP.

1. No United States revenue stamp is required upon an award of arbitrators in order to make it valid. *Celley* v. *Gray*, 136.

STATUTE. *See* ACCOUNT, 5; BOOK ACCOUNT, 6—9; CONTINGENT CLAIM, 1; COSTS, 1, 2; DOWER, 1; EVIDENCE, 10, 11; HUSBAND AND WIFE, 7, 10; INTOXICATING LIQUOR, 4, 5; LIMITATIONS, STATUTE OF, 1, 2, 5; PAUPER, 3, 5; PLEADING, 6; PRACTICE, 2; RAILROAD, 1, 2; RAMS, 1; SHERIFF, 1; SOLDIERS' VOTING ACT; TAXES, 3; USURY, 4, 6.

STATUTE OF FRAUDS. *See* FRAUDS, STATUTE OF.

SUPREME COURT.

1. Where the county court has rendered judgment on an auditor's report, the supreme court will not presume that the county court found any facts besides those reported, except such as are fairly to be inferred from the report itself, as decided in *Pratt* v. *Page et al.*, 32 Vt. 13. *Corliss et al.* v. *Putnam*, 119.

See JURISDICTION, 1.

SURFACE WATER. *See* WATER POWER AND WATER RIGHTS, 1.

TAXES.

1. Where a collector levied a tax on the land of H., prior to 1855, without levying on his body, (the law then in force requiring the collector to levy on the body before resorting to a sale of the land,) and testified in justification of the levy that H., prior thereto, had left the state with the apparent purpose of remaining abroad permanently, and that the collector made diligent inquiry and could not find that he had ever returned to Vermont, before he resorted to a levy on the land, it was *held*, that to rebut this proof evidence was admissible to show that the collector was informed and knew that H. lived in the state when he levied on the land, the question being whether the collector might with due diligence have arrested H. for the taxes. *Hutchins et al.* v. *Moody*, 313.

2. Property consisting of several buildings connected together may be set in the grand list together under an appropriate name, or may be divided up, giving the value of each building by itself. *Canal Co.* v. *Rockingham*, 622.

3. The statute, § 20, ch. 83, G. S., providing that the listers shall set in the list of each taxable person the quantity of real estate owned or occupied by him, has reference to farms and agricultural lands, not to small parcels used for buildings, where the value depends on mere location and business; but if not so set in the list in either case, it does not render the list void, or give the owner any action against the listers, or the town, without showing that the neglect has worked him some loss or injury. *Ib.*

4. When a water power is applied to a mill or factory, it should be taxed with and as a part of it, and when unimproved, it should be taxed with the land to which it belongs, if its existence adds to the value of the property. *Ib.*

See EVIDENCE, 9; PLEADING, 1; SCHOOL DISTICT, 2—5.

TOWN MEETING. *See* TOWNS, 1.

TOWN OFFICERS. *See* TOWNS, 2—5.

TOWNS.

1. A record of the warning of a town meeting and of the proceedings of the meeting held agreeably thereto, is sufficient *prima facie* to show that the warning was in fact posted up as required by law. *Lemington* v. *Blodgett*, 210.

2. The law does not require selectmen to be sworn. *Ib.*

3. Parol evidence is admissible, in behalf of the town to show that the selectmen elected, acted as such during the year. *Ib.*

4. The official certificate of the town clerk is *prima facie* authentic, and papers certified by him are admissible in evidence without other proof that he was either elected to the office, or sworn. *Ib.*

5. The fact that the selectmen became personally liable for liquors purchased by them in behalf of the town for their town agency, and which were turned over to the agent, does not rebut the presumption that the liquors became the property of the town. *Ib.*

6. Assumpsit in the general counts is the appropriate form of action for a town, as well as an individual, to recover for money which the defendant improperly withholds. *Lemington* v. *Blodgett*, 215.

7. Money received by the town liquor agent for the liquors legally sold by him as such agent, is presumed to be the money of the town. *Ib.*

8. The fact that the agent, by agreement with the selectmen, advanced the money for the purchase of the liquors at a specified rate of interest, would not rebut that presumption. *Ib.*

See HUSBAND AND WIFE, 8; PLEADING, 1; SCHOOL DISTRICT, 1—8.

TRESPASS. *See* BOOK ACCOUNT, 1, 2; COSTS, 2; SCHOOLS, 1.

TROVER.

1. Where there is no claim to borrowed property, and no objection to the owner's taking it, a mere refusal to return it on demand to the place whence it was taken according to the agreement when borrowed, is no conversion. *Farrar* v. *Rollins*, 295.

2. The plaintiff gave the note in question for accommodation to the defendant, who was to pay and take care of it, and save the plaintiff from liability upon it. The defendant paid and took up the note after having used it for the purpose designed, and then claimed to hold it as a valid instrument still in force against the plaintiff, and refused to give it up on demand. *Held*, that in the character thus assumed for the note by the defendant, the plaintiff had a right to it and might maintain trover for it. *Park* v. *McDaniels*, 594.

3. The defendant could not, by giving up the note after this suit had been brought, defeat rights and avoid liabilities which existed at the time of bringing the suit. *Ib.*

4. The plaintiff might also recover in the same action, under special averments, for the actual damages which he sustained as a result of the defendant's conduct, (exclusive of the expenses of this suit, beyond the taxable costs, which could not be embraced as such damages and recovered in this action;) and in the absence of such averments, the case having been referred, it is held that said damages may be

allowed the same as though a special count in case had been inserted in, or added by amendment to, the declaration. *Ib.*

See LOTTERY, 1; PLEADING, 4; SHERIFF, 4.

TRUSTEE PROCESS.

1. A judgment in a trustee suit in favor of a claimant does not determine what, if anything, is due the claimant from the trustee; but when the judgment is rendered the trustee is discharged, and the claimant is left to pursue his remedy against him the same as though no trustee suit had ever been brought, and the trustee has the same right to defend. *Carpenter* v. *McClure*, 127.

2. It is not in all cases necessary for the report of a commissioner in trustee process to show in terms that the sale was fraudulent; such facts may be found as to enable the court to say as matter of law that the sale was fraudulent and void. *Stevens* v. *Kirk and Tr's*, 204.

3. Where a grantee executes a bond giving the grantor the right to redeem the land purchased, and subsequently makes an exchange of this for other land with the consent of the grantor, and the understanding that the right of redemption is still to continue in the land received in exchange the same as before, it is *held*, that if the grantee is trusteed by a creditor of the grantor, the land received in exchange will stand in the same condition so far as the trustee process is concerned as the land deeded in exchange stood while the trustee held it. *Ib.*

4. The grantee would not be liable as trustee of his grantor for a note not collected which he received in the exchange of lands as the difference in value. *Ib.*

5. The facts found by the commissioner are not sufficient to authorize the court to pronounce the sale by the defendant to the trustees fraudulent and void as to the creditors of the defendant. *Ib.*

6. The alleged trustees had taken bills of sale of certain property from the principal debtors, to secure them for debts which the principal debtors owed the trustees, and for liabilities the trustees had incurred in their behalf; but in lieu of these bills of sale, and for better security, the trustees took a deed of the principal debtors' real and personal property, conditioned to be void if the said indebtedness should be paid and the trustees indemnified for their liabilities. The trustees were to take full possession and control of the property, collect back accounts and demands, all of which were sold to the trustees and included in the conveyance, convert the personal property into money and pay off said indebtedness and liquidate said liabilities, and were to have the use and occupancy of all the real estate and fixtures for the purpose of completing jobs on hand, &c. *Held*, that this was not an assignment within the meaning of the statute, and therefore not rendered void by reason of non-compliance with its requirements. *McGregor* v. *Chase et al. and Tr's*, 225.

7. There may be a transfer to a party to secure a liability incurred by him for the assignor or grantor, as well as to secure a debt due from the latter to the former. *Ib.*

8. The instrument in this case is a mortgage, and the power of sale contained therein does not essentially change its character. *Ib.*

9. Nor does the provision that the mortgagees are to have possession have that effect. *Ib.*

10. Nor would a subsequent change in the management of the property from what was designed, for the purpose of realizing more from it, render the deed void under the statute relating to assignments. *Ib.*

11. The deed was valid as to the creditors of the principal debtors, and the mortgagees could not be held as trustees either for moneys in their hands or that came to them, or for the property in their hands under the assignment, until their debts against the principal debtors were paid. *Ib.*

12. In order for the creditors to get the surplus, if any, in the hands of the trustees, they must redeem the property by paying the lien of the trustees. *Ib.*

13. If one of the trustees owed the principal debtors on book account at the time the deed was made, the same having been transferred to the trustees in the deed, they will hold it like other accounts until the lien is discharged. *Ib.*

14. A joint debt cannot be the subject of trustee process in a suit against one of the parties alone to whom the debt is due; and a claimant whose claim is not valid may properly raise this objection to the trustees being holden. *Fairchild* v. *Lampson and Tr.*, 407.

15. C. at the request of J. received and invested J.'s bounty money and other pay due to him as a soldier in the United States military service, mingled the money with his own and took the securities therefor in his own name. *Held*, that C. is accountable only as J.'s agent and trustee; that the money so invested by C. is not subject to attachment in his hands by trustee process. *Fuller* v. *Jewett and Tr.*, 473.

16. In an action *ex delicto* the writ, after the declaration, proceeded in the usual form of a summons to a trustee named, and was served on the defendant as an attachment, but no service was made, or attempted to be made, on the trustee. *Held*, that the addition of the trustee part was no sufficient ground for a dismissal of the suit, that part of the writ being regarded as mere surplusage. *Graves* v. *Severens*, 651.

17. A suit is not regarded as "commenced by trustee process," unless that process is used to bring the trustee into court as a party to the suit. *Ib.*

See HOMESTEAD, 1.

UNION STORE ASSOCIATION.

1. Evidence of the custom of doing business in a union store association, whose constitution and all rights and duties under it stand wholly upon agreement and consent, and not at all upon law or acts of incorporation, is admissible to show consent to or acquiescence in a practical and actual modification or change of their by-laws. *Ib.* *Henry et al.* v. *Jackson et al.*, 431.

2. The directors of such an association should not be held to a strict performance of all the duties prescribed for them in the by-laws, as in case of trustees or directors of a private corporation, when it appears that those duties were mainly transferred by the association to an agent, and the members thereof knew how the business was being managed, and of the deviations from the by-laws, and acquiesced in the same. *Ib.*

3. The directors could not be held responsible for bad debts occasioned by allowing the agent to sell on credit; nor for depreciation of stock; nor for error in estimates of current expenses; nor for fixing the prices of goods too low to pay current expenses, this subject having been discussed in the meetings of the di-

vision, and all members having shared in proportion to their purchases in the advantage of buying cheap. *Ib.*

4. In assessing the losses upon members, those who left the state before the business of the division was closed, and are now beyond the reach of process, should be left out of the computation. *Ib.*

See PARTNERSHIP, 1—3.

UNITED STATES REVENUE STAMP. *See* STAMP, 1.

USURY.

1. The plaintiff, on the 1st of April, 1856, purchased of the defendant and his wife the interest of the defendant's wife in the estate of her deceased father for $250.; the plaintiff thereupon executed to the defendant's wife a note for that sum payable on or before ten years from its date without interest, and also executed ten other notes for $20. each, payable one yearly during that period without interest, and the defendant and his wife executed an agreement under seal to deed said interest in said estate to the plaintiff when he should pay said note of $250., and also to give up to him all of said twenty dollar notes which should remain unpaid at the time he should pay said note of $250., and this agreement stated that the consideration of the note of $250. was "the sum which the plaintiff was to pay for the said farm." The plaintiff paid to the defendant one of the twenty dollar notes yearly for six years, and on the 29th of August, 1862, paid him said note of $250. and so much of the seventh twenty dollar note as was in proportion to the year it was covering. *Held*, that this transaction was not upon its face usurious. *Jackson v. Kirby*, 448.

2. *Held*, that parol evidence was admissible to show that the twenty dollar notes were given for yearly interest on the note for $250. at the rate of eight per cent. per annum, and that there was no other consideration for them. *Ib.*

3. *Held*, that an action to recover the usury paid by the plaintiff was properly brought against the defendant alone. *Ib.*

4. *It seems* that under our statute usury may exist where a money debt is created and forborne by the agreement of the parties, even though there may be in such case no loan of money. *Ib.*

5. The defendant was applied to by the plaintiff to loan the plaintiff some money. The defendant finally undertook to raise the money, or get some one to do so, upon the following terms,—the plaintiff was to receive $700., and give a note for $840., secured by a mortgage on his farm, and they agreed upon the time and place of carrying out the transaction. Previously the defendant, unbeknown to the plaintiff, had arranged with one H. to furnish the money and take the note and mortgage; and at the appointed time and place H. met the parties, and the transaction was carried out in that way, though the plaintiff had previously dealt with the defendant alone, for the loan. Soon after this H. paid to the defendant $75., which was paid by H. and received by the defendant, as a part of the transaction of the loan, and in consequence of the bonus of $140. being included in the note. The defendant subsequently purchased the note and mortgage, and the plaintiff paid him the amount of the note including the $140., with the interest thereon. H. acknowledged he had one-half of the extra amount included in the note, and settled with the plaintiff for the share he had received. The plaintiff then brought this action against the defendant for the balance. *Held*, that the defendant was a party to the

usurious contract, so as to make him liable to refund so much of the usury paid, as he received, though not named as a pary in the security given. *Williams* v. *Wilder*, 613.

6. *It seems*, that had the defendant had no connection with the usurious contract, but been merely an innocent holder of the note while current, the plaintiff could not have resisted payment of the usury; the law being regarded as settled that where the statute merely declares the consideration illegal, without saying the security shall be void, then the security is good in the hands of an innocent holder for value, if taken in due course of business in the mercantile sense. *Ib.*

7. But had the defendant taken the note with knowledge of the usury, without having had any connection with the contract, the plaintiff might have resisted payment of the usury; but whether he could recover it back when paid, *quere*. *Ib.*

8. H. paid the defendant the said $75. more than six years before this suit was brought, but the plaintiff made the payment on the note to the defendant within six years. *Held*, that the plaintiff's cause of action arose when the last payment was made. *Ib.*

See CORPORATIONS, 9.

VOTING. *See* SOLDIERS' VOTING ACT.

WARRANTY. *See* PLEADING, 3.

WATER POWER AND WATER RIGHTS.

1. The surface water flowed naturally from the plaintiff's land on to the land of the defendant. The plaintiff was in the habit of pouring filthy water from his kitchen on to the defendant's premises, which ran into and injured the defendant's well. *Held*, that after giving notice, the defendant might erect an obstruction so as to prevent this injury even if it resulted in turning back the surface water on to the plaintiff's land to his injury. *Beard* v. *Murphy*, 99.

See TAXES, 4.

WILLS.

1. Construction given to the words "my other legatees," in a will. *Putnam et al.* v. *Bible Society et al.*, 271.

2. Where the testator made his will in 1857, and wrote it mostly upon one side of a half sheet of foolscap paper, the signature and attestation clause being upon the other side of the same paper near the top, and two years afterwards wrote below all the writing and near the middle of the sheet, "This will is hereby cancelled and annulled in full this 15th day of March, 1859," it was held to amount to a revocation of the will by "cancelling," and it cannot be thereafter revived by parol declarations of such a purpose or desire on the part of the testator. KELLOGG, J., dissenting. *Warner* v. *Warner's Est.*, 356.

3. W. devised by will all his property to his wife S. during her natural life, and after her decease, to his adopted son George, on condition that he should be a faithful son. George lived with the testator until his decease, and with S. until she broke up housekeeping, always a faithful son, when by her consent, and in

pursuance of an arrangement between herself and George's father, he returned to his father's at the age of nine years, and lived with him until the death of S., a period of several years. Soon after his return, S. and the father of George, by mutual consent, caused the articles of apprenticeship under which George went to live with W. at the age of three years, to be canceled. All these acts were done without consulting George, and without any reference to his wishes. *Held*, that his return to his fathers was no violation of the condition of the will. Nor could the cancellation of the articles of apprenticeship affect the will. *Wells et al.* v. *Est. of Wells*, 483.

4. The declarations of the testator, made subsequent to the execution of the will in question, to the effect that that will did not vary from a former will which he had made, are inadmissible to vary and alter the provisions of the last will, expressed in clear and explicit terms, without ambiguity. *Ib.*

5. The testator, among other bequests, gave to Francis D. Prouty, for the comfortable maintenance of his daughter Polly Miller, during the term of her natural life, the use of certain specified property, including both real and personal estate, and immediately following the list of property so given, is this provision: "It is my will, and I do hereby order, that my executors, administrators and assigns, upon the decease of my daughter Polly Miller, in the division of the above named property left for her comfortable maintenance, both real and personal, do allow the said Francis D. Prouty an equal share with the male children of my daughter Tirzah, wife of Isaac Bishop, and the male children of my late daughter Almira, late wife of Dan Mather. The same I do give and bequeath unto the said Francis." *Held*, that the testator intended by said provision to make a final disposition of all the property referred to therein, by directing a division of it between Prouty and the male children of his said two daughters,—Prouty and the children taking the whole in equal proportions according to the whole number. *Prouty* v. *Bishop et al.*, 634.

See HOMESTEAD, 6.

WITNESS. *See* EVIDENCE.

WRIT. *See* PLEADING 5.

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